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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1959~~ 1960

No. ~~752~~ 47

LAWRENCE CALLANAN, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 1, 1960
CERTIORARI GRANTED APRIL 4, 1960

SUPREME COURT OF THE UNITED STATES

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INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 16, 1960

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

COPY

Criminal No. 27761 (2)

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, CARL BIANCHI, L. A. THOMPSON, WILLIAM POSTER and R. M. SECOR, Defendants.

INDICTMENT

The Grand Jury charges:

Count I

1. That at all times hereinafter mentioned, a part of the interstate commerce of the United States has consisted of the transportation of men, materials, supplies, and machinery used in the construction, removal, and reconstruction of pipe lines and appurtenances thereto used in the distribution and transportation of natural gas, crude oil, petroleum, and refined petroleum products; that a further part of such commerce has consisted of the production, purchase, sale, transportation, distribution, and movement of natural gas, crude oil, petroleum, and refined petroleum products in pipe lines between the several states of the United States.

2. That at all times hereinafter mentioned, O. R. Burden Construction Corporation, hereinafter referred to as the "construction company," Sinclair Pipe Line Company, and [fol. 2] Platte Pipe Line Company were parties to several contracts for the construction of certain portions of an in-

terstate pipe line such as is referred to hereinabove, running from Cushing, Oklahoma, to Forest City, Illinois, and passing through the State of Missouri; and for the removal of certain portions of another such pipe line between Shannondale, Missouri, and Wood River, Illinois, and passing through the State of Missouri. That for the purpose of performing said contracts and also as a direct consequence of performing the same, the parties thereto, and various other persons and organizations, caused men, materials, supplies, and machinery to move in interstate commerce between various points in the United States and the sites of said construction and removal and, more particularly, from outside the State of Missouri into the State of Missouri. That said pipe line companies at all times hereinafter mentioned, as well as at times prior thereto and subsequent thereto, caused crude oil, natural gas, petroleum, and refined petroleum products to move in interstate commerce by means of said pipe lines. That all of these movements were directly affected by the undertakings hereinbefore mentioned and by the acts of defendants hereinafter mentioned.

3. That at all times hereinafter mentioned, Lawrence Callanan was an agent and representative of Local No. 562 of the United Association of Pipe Fitters affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitters Industry of the United States and Canada, American Federation of Labor; that Carl Bianchi was agent and representative of Local No. 513 of the International Union of Operating Engineers, American Federation of Labor; that L. A. Thompson was agent and representative of Local No. 574 of the Building Material and Construction Chauffeurs Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, American Federation of Labor; that L. A. Thompson was an agent and representative of Teamsters Joint Council No. 78; that William [fol. 3] Poster and R. M. Secor were agents and representatives of the Eastern Missouri Laborers' District Council and of Local Nos. 110 and 916, respectively, of the International Hod Carriers', Building and Common Laborers' Union of America, American Federation of Labor; that

said Lawrence Callanan, Carl Bianchi, L. A. Thompson, William Poster, and R. M. Secor, in their aforesaid official and representative capacities, represented the members of their respective unions who were to be employed and were employed on those portions of said pipe line projects located in the State of Missouri.

4. That commencing on or about the first day of March, 1951, the exact date being to the grand jurors unknown, and continuing thereafter up to and until the date of the return of this indictment, in the Eastern Division of the Eastern District of Missouri and within the jurisdiction of this Court,

Lawrence Callanan,
Carl Bianchi,
L. A. Thompson,
William Poster, and
R. M. Secor,

defendants herein, well knowing all matters of fact aforesaid, did Knowingly, Willfully, Unlawfully, and Feloniously combine, conspire, confederate, and agree together and with each other, and with divers other persons, whose true and full names are to the grand jurors unknown, to obstruct, delay, and affect interstate commerce between the several states of the United States and the movement of the aforesaid articles, commodities, materials, supplies, machinery, and men, in such commerce, by extortion, to wit: by obtaining property to the value of $28,016.18 in the form of money, and the payment of money to third parties for and on behalf of defendants, from O. R. Burden, individually and as agent of said construction company, with the consent of said O. R. Burden and said company, induced by the wrongful use of actual and threatened force, violence, and fear.

[fol. 4] 5. That it was part of said conspiracy that defendants would demand and obtain the property mentioned in paragraph 4 herein for the personal benefit of defendants and not for the benefit of labor unions and organizations nor the members thereof, respectively represented by defendants as aforesaid.

6. That it was part of said conspiracy that defendants, for the purpose of enforcing their demands upon said O. R. Burden and said construction company for property, as mentioned in paragraphs 4 and 5 herein, would, in their purported capacities as labor union representatives, under the guise of attempting to obtain benefits for, and protecting the rights of members of said unions, embark wrongfully and corruptly upon a course of oppressive action against said O. R. Burden and said construction company, by calling and conjuring up strikes, causing labor disputes, work stoppages, and difficulties in connection with said pipe line projects, and other labor troubles under various pretexts and claims of right, but not actually for the purpose of obtaining legitimate labor objectives and as legitimate devices of organized labor to secure improvement in wages, working conditions, and terms of employment of union members employed by said construction company on said pipe line projects, defendants well knowing that said actions would delay, obstruct, and affect said pipe line projects, and the transportation from out the State of Missouri of articles, commodities, materials, supplies, machinery and men to said pipe line projects within the State of Missouri.

7. That it was part of said conspiracy that defendants would make arbitrary, excessive, unreasonable, and unjustified demands upon the said O. R. Burden, individually and as agent of the construction company, for the hiring of workmen not necessary to the performance of said contracts [fol. 5] and whose hiring would not have been required nor acceded to but for defendants' use of force, violence, and fear.

8. That it was part of said conspiracy that such demands for unnecessary workmen would be waived or withdrawn and that the construction company would be excused from hiring such unnecessary workmen if defendants obtained the property, referred to in paragraphs 4 and 5 herein, from O. R. Burden and said construction company.

9. That it was part of said conspiracy that defendants would demand and enforce the use of wasteful methods and

labor practices on said pipe line projects under the guise of representing their respective labor organizations and the members thereof.

10. That it was part of said conspiracy that such demands for the use of wasteful methods and labor practices would be waived and withdrawn if the defendants obtained the property, referred to in paragraphs 4 and 5 herein, from O. R. Burden and said construction company.

11. That it was part of said conspiracy that defendants would and did make threats to O. R. Burden and the construction company that defendants would use the force and power of their authority as representatives of labor organizations to prevent said construction company from using labor in the manner usual in said company's business unless and until defendants obtained the property, mentioned in paragraphs 4 and 5 herein, from O. R. Burden and said construction company.

12. That it was part of said conspiracy that defendants would assure said O. R. Burden and said construction company that if the property, mentioned in paragraphs 4 and 5 herein, were obtained by defendants, pleasant labor relations would be maintained with all workmen represented by [fol. 6] defendants, and that the performance of the aforesaid contracts would proceed in a workmanlike and efficient manner, and in the manner usual in said construction company's business.

13. That it was part of said conspiracy that defendants would and did make threats to the said O. R. Burden and said construction company that defendants would exercise the force and power of their authority as representatives of labor organizations to cause strikes and work stoppages during the performance of said contracts if defendants did not obtain the property mentioned in paragraphs 4 and 5 herein, from said O. R. Burden and the construction company aforesaid.

14. That is was further part of said conspiracy that defendants would make the demands and threats mentioned in paragraphs 5, 6, 7, 9, 11, 13 herein for the purpose of instilling and planting in the minds of said O. R. Burden and

the agents of said construction company, fear that if defendants' demands for money as aforesaid were not complied with, economic loss would result to said O. R. Burden and said construction company as the result of inefficient and unworkmanlike labor, and also work stoppages, work slowdowns, jurisdictional disputes, and strikes.

Contrary to the terms and provisions of Section 1951, Title 18 (Rev.), United States Code.

F nm 10,000 or I nm 20 y or b

[fol. 7] Count II

1. That at all times hereinafter mentioned, a part of the interstate commerce of the United States has consisted of the transportation of men, materials, supplies, and machinery used in the construction, removal, and reconstruction of pipe lines and appurtenances thereto used in the distribution and transportation of natural gas, crude oil, petroleum, and refined petroleum products; that a further part of such commerce has consisted of the production, purchase, sale, transportation, distribution, and movement of natural gas, crude oil, petroleum, and refined petroleum products in pipe lines between the several states of the United States.

2. That at all times hereinafter mentioned, O. R. Burden Construction Corporation, hereinafter referred to as the "construction company," Sinclair Pipe Line Company, and Platte Pipe Line Company were parties to several contracts for the construction of certain portions of an interstate pipe line such as is referred to hereinabove, running from Cushing, Oklahoma, to Forest City, Illinois, and passing through the State of Missouri; and for the removal of certain portions of another such pipe line between Shannondale, Missouri, and Wood River, Illinois, and passing through the State of Missouri. That for the purpose of performing said contracts and also as a direct consequence of performing the same, the parties thereto, and various other persons and organizations, caused men, materials, supplies, and machinery to move in interstate commerce between various points in the United States and the sites of said construction and removal and, more particu-

larly, from outside the State of Missouri into the State of Missouri. That said pipe line companies at all times hereinafter mentioned, as well as at times prior thereto and subsequent thereto, caused crude oil, natural gas, petroleum, and refined petroleum products to move in interstate commerce by means of said pipe lines. That all of these movements were directly affected by the undertakings hereinbefore mentioned and by the acts of defendants hereinafter mentioned.

[fol. 8] 3. That at all times hereinafter mentioned, Lawrence Callanan was an agent and representative of Local No. 562 of the United Association of Pipe Fitters affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitters Industry of the United States and Canada, American Federation of Labor; that Carl Bianchi was agent and representative of Local No. 513 of the International Union of Operating Engineers, American Federation of Labor; that L. A. Thompson was agent and representative of Local No. 574 of the Building Material and Construction Chauffeurs Union affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, American Federation of Labor; that L. A. Thompson was an agent and representative of Teamsters Joint Council No. 78; that William Poster and R. M. Secor were agents and representatives of the Eastern Missouri Laborers' District Council and of Local Nos. 110 and 916, respectively, of the International Hod Carriers', Building and Common Laborers' Union of America, American Federation of Labor; that said Lawrence Callanan, Carl Bianchi, L. A. Thompson, William Poster, and R. M. Secor, in their aforesaid official and representative capacities, represented the members of their respective unions who were to be employed and were employed on those portions of said pipe line projects located in the State of Missouri.

4. That commencing on or about the first day of March, 1951, the exact date being to the grand jurors unknown, and continuing thereafter up to and until the date of the return of this indictment, in the Eastern Division of the

[fol. 9] Eastern District of Missouri and within the jurisdiction of this Court,

Lawrence Callanan,
Carl Bianchi,
L. A. Thompson,
William Poster, and
R. M. Secor,

defendants herein, well knowing all matters of fact aforesaid, did Knowingly, Willfully, Unlawfully, and Feloniously obstruct, delay, and affect interstate commerce between the several states of the United States and the movement of the aforesaid articles, commodities, materials, supplies, machinery, and men, in such commerce, by extortion, to wit: by obtaining property to the value of $28,016.18 in the form of money, and the payment of money to third parties for and on behalf of defendants, from O. R. Burden, individually and as agent of said construction company, with the consent of said O. R. Burden and said company, induced by the wrongful use of actual and threatened force, violence, and fear.

5. Defendants threatened and committed acts of violence to the persons of officers and employees, and to the property, of said O. R. Burden Construction Company.

6. Defendants caused the said O. R. Burden to fear that the contracts mentioned in paragraph 2 would be delayed in completion of their performance, that said O. R. Burden and O. R. Burden Construction Company would suffer financial loss in the performance of said contracts and that officers and employees of said company would be injured and property of said company would be damaged, if the defendants did not obtain property as stated in paragraph 4, under the guise of representing their respective labor organizations and the members thereof.

[fol. 10] 7. Defendants threatened the said O. R. Burden and the said construction company that defendants would, in their purported capacities as labor union representatives, embark wrongfully and corruptly upon a course of oppressive action against said O. R. Burden and said construction

company by calling and conjuring up strikes, causing labor disputes, work stoppages, and difficulties in connection with said pipe line projects, and other labor troubles, under various pretexts and claims of right, under the guise of representing their respective labor organizations and the members thereof.

8. Defendants threatened said O. R. Burden and said construction company that defendants would make arbitrary, excessive, unreasonable and unjustified demands upon said O. R. Burden and said construction company for the hiring of workmen not necessary for the performance of said contracts, under the guise of representing their respective labor organizations and the members thereof.

9. Defendants threatened the said O. R. Burden and the said construction company that defendants would demand and enforce the use of wasteful methods and labor practices on said pipe line projects, under the guise of representing their respective labor organizations and the members thereof.

Contrary to the terms and provisions of Section 1951 Title 18 (Rev.), United States Code,

F nm 10,000 or I nm 20 y or b.

Harry Richards, United States Attorney.

A True Copy of the Original
Filed March 3, 1954

Attest: Geo. J. Brennan, Clerk, By Harold G. Pryce, Deputy Clerk.

Dated: Aug. 24, 1959, St. Louis, Mo.

(Seal)

[fol. 11]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761 (2)

UNITED STATES OF AMERICA,

—v.—

LAWRENCE CALLANAN.

JUDGMENT AND SENTENCE AS TO DEFENDANT LAWRENCE CALLANAN—July 19, 1954

On this 19th day of July, 1954 came the attorney for the government and the defendant appeared in person and with Morris A. Shenker, his attorney.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty heretofore returned by jury of the offenses of wilfully, unlawfully and feloniously conspiring to obstruct, delay and affect commerce and in the furtherance of said conspiracy did obtain property in the form of money for personal use and profit by extortion as charged in count one; and with wilfully, unlawfully and feloniously obstructing, delaying and affecting commerce, by extortion of property in the form of money for personal use as charged in count two of the indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Twelve (12) Years Under Count one of the indictment herein;

Twelve Years (12) under Count two of the indictment herein;

the term of imprisonment imposed on said defendant under Count Two to run consecutively and cumulatively, [fol. 12] and not concurrently, with term of imprisonment of twelve years imposed on defendant under said Count One of said indictment. Execution of sentence imposed on said defendant under said Count Two of said indictment, suspended and defendant placed on probation under said Count Two for a period of Five Years, which term of probation shall begin and run consecutively and not concurrently with them of imprisonment of Twelve Years imposed upon defendant under Count One of such indictment; and in addition to the general conditions of probation the Court imposes the special conditions that during the term of probation the defendant shall not, directly or indirectly, hold any office or act in any representative capacity, at any time, for any labor union or labor organization of any character, with or without compensation, which term and special conditions of probation do not restrict defendant in becoming, or continuing as a member of any labor organization.

Rubey M. Hulen, United States District Judge.

[fol. 13] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761 (3)

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, et al., Defendants.

MOTION OF DEFENDANT LAWRENCE CALLANAN FOR CORRECTION OF SENTENCE UNDER COUNT I—Filed December 17, 1958

Defendant Lawrence Callanan moves the Court under Rule 35, F. R. Crim. P., or, in the alternative under 28 U.S.C. §2255, to correct the sentence of twelve years im-

prisonment imposed against him on July 19, 1954 on Count I, by relieving him of four years imprisonment imposed under said sentence, which sentence, when taken together with the twelve years imprisonment imposed on Count II on said date, was in excess of the maximum twenty years imprisonment authorized by law, and as grounds for this motion states:

(1) Defendant is presently and has been since July 19, 1954 incarcerated under said sentence of July 19, 1954.

(2) Count I of the indictment charged, that from March 1, 1951 until the date of the indictment, that defendants did wilfully, unlawfully and feloniously conspire to obstruct, delay and affect interstate commerce by extortion, by obtaining property in the form of money in the amount of $28,016.18 for and on behalf of defendants from O. R. Burden, individually and as agent of the O. R. Burden Construction Company, with the consent of O. R. Burden and said company, induced by the wrongful use of actual and threatened force, violence and fear.

[fol. 14] (3) Count II of the indictment charged, that from March 1, 1951 until the date of the indictment, that defendants did wilfully, unlawfully and feloniously obstruct, delay, and affect interstate commerce by extortion by obtaining property in the form of money in the amount of $28,016.18 for and on behalf of defendants from O. R. Burden, individually and as agent of the O. R. Burden Construction Company, with the consent of O. R. Burden and said Company, induced by the wrongful use of actual and threatened force, violence and fear.

(4) Count I, thus, charged conspiracy to commit the same offense set forth in Count II.

(5) This defendant was convicted under both counts and on July 19, 1954 was committed to imprisonment for a period of twelve years under Count I and twelve years under Count II of the indictment, the term of imprisonment imposed on him under Count II was made to run consecutively and cumulatively, and not concurrently, with the term of imprisonment imposed on him under Count I of the indictment. Execution of sentence imposed under Count II was

suspended and he was placed on probation under Count II for a period of five years, which term of probation was made to run consecutively with the term of imprisonment imposed under Count I.

(6) Section 1951 of Title 18 provides:

> "Whoever in any way or degree obstructs, delays, or affects commerce * * * by robbery or extortion or attempts or conspires so to do or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

(7) Said section thus imposed a maximum penalty of twenty years imprisonment for obstruction of commerce by any of the manners set forth in said section.

[fol. 15] (8) Congress by said section did not intend that a person be subjected to two penalties for obstruction of commerce by extortion and by conspiracy.

(9) This defendant, by receiving a total sentence of twenty four years for obstruction of commerce by extortion under Count II and by conspiracy under Count I has received punishment in excess of the twenty year maximum authorized by law.

Morris A. Shenker, 408 Olive St., St. Louis 2, Mo.,
Attorney for Defendant Callanan.

Oral argument and leave to present evidence requested.

[fol. 17]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761 Court 3

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, Defendant.

St. Louis, Missouri
March 9, 1959.

Transcript of Hearing on Motion for Correction of Sentence—March 9, 1959

Transcript of evidence adduced and proceedings had during the hearing of motion of defendant for correction of sentence under count I in above styled cause before Honorable Randolph H. Weber, Judge of the District Court of the United States, Eastern District of Missouri, Eastern Division, presiding in Court No. 3 thereof.

APPEARANCES:

Mr. Wayne H. Bigler, Jr., Assistant United States Attorney.

Mr. Morris A. Shenker, Attorney for Defendant.

[fol. 18] COLLOQUY BETWEEN COURT AND COUNSEL

The Court: This is just a matter for the presentation of the law?

Mr. Shenker: The only thing we have, Your Honor, we worked out a stipulation of what the record should consist of in this case. In this stipulation we have a provision that either party may add to the record. I will hand the Court

the stipulation. You might want to see it, so that when we discuss it, the matter will be clear to the Court.

Under the law, as I understand, applicable to motions of this kind, some determination should be made as to what the record will consist of that the Court will concern itself with.

The Court: All right.

Mr. Shenker: This stipulation, if it please the Court, which was signed and agreed to by both sides with the exception that either side may add to the record, provides primarily that the record shall consist of the indictment in the case, the instructions of the Court, that is the instructions that the Judge gave to the jury, and the judgment and sentence of the Defendant Callanan, which was imposed on July 19, 1954. In addition to that the stipulation of facts which was entered into, and the original of which I just handed to the Court. Anything further than that, if it please the Court, is something that, if Mr. Bigler has something that he wants to add pertaining to the stipulation, it is perfectly agreeable to us. We have no objection to add-
[fol. 19] ing anything else. As far as we are concerned, we are satisfied with making those four designated additions, the stipulation, the indictment, the instructions of the Court, and the judgment and sentence, as constituting the record on which we proceed and are asking to read before the Court.

The Court: The record may show that the stipulation is filed.

It occurs to me, however, that the Court is not bound to confine itself within the stipulation. I think the stipulation may be filed for the purpose of joining up and bringing in writing just exactly what the stipulations are. But this is a motion of the defendant in the case to correct the sentence entered in this court, and I think the Court can only be guided by what the record is, even to the extent that it wouldn't have to be limited by what the parties say the record is. If I should find something in the record, for instance, which would be contrary to that which is entered into in the stipulation, I don't think the Court should be bound by it.

Mr. Shenker: I frankly don't know. But we are not attempting to bind the Court or limit the Court. To the contrary, this we thought would aid the Court and clarify the issues.

The Court: For that purpose the Court is allowing it to be filed, but at the same time I am stating that I am not going to be, and I don't think I have to be, confined to mat-
[fol. 20] ters only those matters which are raised in the stipulation, because this is a matter which goes to the Court correcting a sentence and a judgment of this court. And I don't think the parties could limit the Court to any particular part of this proceeding. I think then we understand each other. As I understand, the stipulation is for the purpose of being of aid and assistance to the Court.

Mr. Shenker: That is right, Your Honor, clarifying the issues.

The Court: O. k.

Mr. Shenker: In line with that, Your Honor, the indictment the Court has. That is a matter in the file, and there would be no necessity to offer that in evidence. It is in the record and part of the file. The instructions of the Court, that were given, we have that. I don't know if the Court has those in the file or not; but we have them.

The Court: They would be in the transcript.

Mr. Shenker: We have them printed. Your Honor, we have them in a printed volume. I am submitting them to the Court from the volume, that is submitting the volume, and the instructions are [redacted] set out verbatim.

The Court: All right.

Mr. Shenker: It would be easier for the Court to read it rather than the typed form.

[fol. 21] Will you mark them Defendant's Exhibit No. 1?

(Thereupon the document above referred to was marked by the reporter as Defendant's Exhibit No. 1.)

May it please the Court, I will introduce Defendant's Exhibit 1, which exhibit contains the instructions of the Court. I am trying to find the page where they start. The instructions begin, if it please the Court, on page 662 and they continue to page 704 at the bottom of the page.

If we may, if the Court please, we should like to mark the stipulation which we gave you as Defendant's Exhibit No. 2.

(Thereupon the stipulation above referred to was marked by the reporter as Defendant's Exhibit No. 2.)

We will offer into evidence Defendant's Exhibit No. 2, if it please the Court, which is the stipulation of facts which we previously discussed with the Court.

The indictment I do not believe has to be marked.

The Court: It is a part of the file.

Mr. Shenker: That is right. And the judgment and sentence of the Court, that is also a matter of the record proper in the court file. Those are the only matters, if it please the Court, that we are offering in support of our motion.

The Court: All right. Mr. Bigler, do you have anything to offer?

Mr. Bigler: The only thing I would like to add, as far as [fol. 22] the stipulation is concerned, Your Honor, which Mr. Shenker and Mr. Glaser made up from the record, as I understand from appellant's brief and the brief of the Solicitor General, is a change which was just called to my attention in the proposed stipulation before it was signed here. I think that probably that could be set out. It relates to the method of payment or alleged payment to the defendant Callanan of this extortion money. On page 3 of the stipulation, up at the top there is—

The Court: Under Section (g)?

Mr. Bigler: Under subsection (g), the second sentence: "A friend of Callanan set up a fictitious company which sent invoices to the Burden Company." That was changed a little bit from the proposed stipulation. I should like to insert at that point after that sentence—

The Court: Just a minute. Which line is that?

Mr. Bigler: It is the third and fourth lines on page 3 of the stipulation.

The Court: "A friend of Callanan—"

Mr. Bigler: "—set up a fictitious company which sent invoices to the Burden Company." Right at that point I propose to insert an asterisk, and in discussing what is meant by the asterisk to refer to the appellant's statement

in appellant's brief in the United States Court of Appeals which goes into further details in connection with that allegation.

[fol. 23] I don't know whether this would be stipulated to by Mr. Shenker, but as long as we are permitted to bring in things outside of the stipulation, may we at this time, Your Honor, call the Court's attention to the more detailed facts in evidence. On page 7 of the brief, it is stated as follows; at the very bottom of this page of appellant's brief in the Court of Appeals: It is stated Sariego testified that after the meeting Callanan called Balch, an international organizer at the union meeting, and told him to set up a fictitious company, the Welders—Pipeline Welders' Supply Company. It sent out Pipeline Welders' Supply Company invoices in the amount of $1606.40 and $1616.24 to the Burden Company and was paid for both invoices by check. The following paragraph probably should be inserted too: Burden Corporation checks dated October 14th and October 30, 1952, each in the amount of $3791.04, were sent to our mailing address.

That is all that I want to insert, the further details of this charge, which I was advised of today.

Mr. Shenker: We have no objection to that insertion, Your Honor.

Mr. Bigler: Other than that, I think the references made to the transcript and to the record of the case proper.

The Court: I have manually put in the asterisk here at the place where you want to make that insertion. I would suggest that the matters to which you have just referred and [fol. 24] just introduced and which will be received in evidence be reduced to writing and attached to the back of the stipulation.

Mr. Bigler: All right. That is very easily done.

The Court: Of course you have them there. You have actually referred to them.

Mr. Bigler: It is page 27 of the appellant's brief in the United States Court of Appeals on appeal proper in the case.

The Court: All right.

Reporters' Certificate to foregoing transcript (omitted in printing).

[fol. 25]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

[Title omitted]

DEFENDANT'S EXHIBIT NO. 2—STIPULATION

I. The United States and Lawrence Callanan stipulate that the record in this case on defendant Callanan's motion to correct his sentence may consist of the following documents: (a) The Indictment; (b) the Instructions of the Court; and (c) the Judgment and Sentence of Defendant Callanan imposed on July 19, 1954.

II. The United States and Lawrence Callanan further stipulate that the record in this case on defendant Callanan's motion to correct his sentence may consist of the following summary of evidence offered at the trial by the government to sustain the conviction on both counts of the indictment, it being specifically understood that Lawrence Callanan is not admitting that any of the matters hereinafter set out in the statement of facts took place but that it is done for the purpose of presenting a statement of the evidence of the trial in the light most favorable to the government.

(a) Defendants were labor union representatives; Callanan for the Pipefitters; Bianchi for the Operating Engineers; Thompson for the Teamsters; Porter and Secor for the Laborers.

(b) On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four hours a day [fol. 26] for a full day's pay; more men were put on the job than were necessary and labor costs were higher than for similar work in other comparable regions.

(c) In May 1952, when the Burden Company was getting ready to start upon another project involving the con-

struction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of Callanan, he had lunch with Callanan alone; that at such luncheon, he told Callanan about his difficulties and said that something drastic would have to be done if the company was to complete the project without great loss. Callanan then asked Burden how much money there was in the job and whether there could be one cent a foot on the project, a rate which would total $28,000 or $29,000, on the whole job. Callanan told Burden that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told Callanan that no payment would be made until a substantial portion of the work was done.

(d) At this meeting between Callanan and Burden, it was agreed that payments to the defendants would be made by false invoices.

(e) Burden also testified that, after the project had been started, he had a private meeting with Callanan in August, 1952, in which he complained that defendants were not living up to the agreement. Callanan assured him that the work would pick up and that he would talk to the other crafts.

(f) The Burden Company paid $28,000 on invoices from various companies or individuals.

[fol. 27] (g) Thompson, Porter and Secor were shown to have received money from the Washington Equipment and Construction Company which submitted bills to Burden. A friend of Callanan set up a fictitious company which sent invoices to the Burden Company.* In November 1952, after Bianchi complained to Burden that he had not received his share of the agreement, Burden gave Bianchi two checks totalling $2,516.00 made to the order of two names appearing on invoices. In March 1953, Thompson made a similar complaint and thereafter a check for $3,980.00 payable to the Washington Equipment Company was sent to that company.

III. It is further stipulated that Callanan commenced service of his sentence of imprisonment under the judgment in this case on July 19, 1954 and is presently in custody under this sentence at the United States Penitentiary at Leavenworth, Kansas.

IV. It is further stipulated that either party has the right to augment this stipulation by any facts which appear in the record of the case as printed for the United States Court of Appeals for the Eighth Circuit in Causes No. 15,139 to 15,143 inclusive.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Mo., Attorney for defendant Callanan.

Wayne H. Bigler, Jr., Asst. United States Attorney, Attorney for Plaintiff.

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761

UNITED STATES OF AMERICA, Plaintiff,

—v.—

LAWRENCE CALLANAN, Defendant.

OPINION—May 8, 1959

Lawrence Callanan has filed a Motion to Correct Sentence Under Count I, under Rule 35, F.R.Cr.P., or, in the Alternative under Title 28, §2255, U.S.C. Said defendant will hereinafter be referred to as Movant.

Movant was convicted in this Court under an Indictment in two counts charging him with conspiracy to extort in the first count and with the substantive offense of extortion in

the second count. The Indictment was based upon Title 18, §1951, U.S.C., known as the Hobbs Act, or the Anti-Racketeering Act.[1]

Movant was sentenced on July 19, 1954, by the late Honorable Rubey M. Hulen, then Judge of this Court, [fol. 29] to 12 years imprisonment upon Count I (the conspiracy), and 12 years imprisonment upon Count II (the extortion), said sentences to run consecutively and cumulatively and not concurrently, with the term imposed in Count I. However, the sentence imposed under Count II was suspended and he was placed upon probation under Count II for a period of five years, which term of probation was ordered to begin and run consecutively and not concurrently with the term of imprisonment of 12 years imposed upon defendant under Count I. (In other words, the probation period was to begin at the end of the service of the sentence imposed in Count I.)

Movant began serving his sentence immediately, but his case, along with his co-defendants, was appealed to the United States Court of Appeals for the Eighth Circuit, and the decision affirming his conviction, sentence and judgment is found in *Callanan* v. *United States* (1955), 223 F. 2d 171, cert. den. 350 U.S. 862.

Movant's contention in his Motion for Correction of Sentence is unique. He seeks to correct the sentence under Count I contending that it is an illegal sentence when taken together with the sentence imposed on Count II; he further contends Count I and Count II are both variants of a single offense and as he received a 12-year sentence on each count, or a total of 24 years, the sentence is therefore 4 years in excess of the maximum punishment of 20 years provided in the statute; he contends that the sentence is [fol. 30] valid to the extent of the maximum only, to wit,

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[1] Title 18, §1951, U.S.C., in its pertinent part: "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

20 years, and is void as to the excess of 4 years; therefore, he seeks to have the Court correct the sentence by eliminating 4 years of the excessive judgment under Count I so as to provide for imprisonment for 8 instead of 12 years.

Although the Court cannot grant the relief Movant seeks (for the reasons that will be stated in this Opinion) he is probably entitled to an "A" for ingenuity, to say the least.

Movant, in his argument and brief, runs the whole gamut of cases,[2] both old and new, concerning the merging of offenses into one crime and the application of the "Rule of Lenity."[3]

The *Universal C.I.T. Credit Corp.* case applied the rule of lenity to record keeping provisions of the Fair Labor Standards Act, holding that the Act prohibited a "cause of conduct" rather than separate offenses for each breach of statutory duty; the *Prince* case applied the rule to the crime of entry into a bank with intent to rob and the con- [fol. 31] summated robbery; the *Bell* case applied the rule to transportation of two women on the same trip in violation forbidding the transportation for purpose of prostitution; in the recent *Ladner* case the Supreme Court, in reversing and remanding to the District Court, applied the rule holding that a single discharge of a shotgun constitutes only a single violation of a statute penalizing assault on federal officers even though more than one federal officer was wounded; the *Heflin* case follows the rule set down in the *Prince* case; the *Gore* and *Harris* cases refused to apply the rule in narcotic cases where the same drug was the object of both sale and possession, holding that legislation revealed the determination of Congress to "turn the screw

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[2] *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218; *Prince* v. *United States*, 352 U.S. 322; *Bell* v. *United States*, 349 U.S. 81; *Ladner* v. *United States*, 230 F. 2d 726, reversed & remanded 358 U.S. 169; *Heflin* v. *United States*, (1959) 358 U.S. 45, 79 S.Ct. 451; *Gore* v. *United States*, 357 U.S. 386; *Harris* v. *United States*, (1959) 359 U.S. 19.

[3] Generally stated the "Rule of Lenity" is that where the intention of Congress is not clear from the Act itself, and reasonable minds might differ as to its intention, the Court will adopt the less harsh meaning. See *Ladner* v. *United States*.[2]

of criminal machinery—detection, prosecution and punishment—tighter and tighter."

Movant contends that an examination of the Anti-Racketeering Act, in the light of its legislative history, suggests that while each of the disjunctive itemizations of the Act might constitute a separate crime, when standing alone, the rule of lenity should be applied when more than one of the elements exist. In other words, that while a person may be prosecuted and convicted of either of the offenses enumerated in the act, he cannot be prosecuted for more than one of these offenses, as the separate acts would merge into one offense.

The rule has been well established that where a person is charged with conspiracy to violate some federal law under the general conspiracy statute (Title 18, U.S.C., §371) [fol. 32] and then is charged separately with doing the substantive or overt act which is the object of the conspiracy, he may be charged, tried and sentenced separately on each count or offense. See *Burton* v. *United States* (1906), 202 U.S. 344, 377; *United States* v. *Rabinowich*, 238 U.S. 78; *Chew* v. *United States* (C. A. 8, 1925), 9 F. 2d 348; *Pinkerton* v. *United States* (1946), 328 U.S. 640, 643; *Lisansky* v. *United States* (C. A. 4, 1929), 31 F. 2d 846; *Brown* v. *United States* (C. A. 8, 1948), 167 F. 2d 772; *United States* v. *Rosenblum* (C. A. 7, 1949), 176 F. 2d 321.

In the *Pinkerton* case (supra), l.c. 643, Mr. Justice Douglas said:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. • • • The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

To this line of cases Movant raises the charge that they refer to overt acts which are enumerated in the statutes as specific crimes and with the general statute on conspiracy. He points out that in the case at bar all the offenses, in-

cluding conspiracy, are charged in just one statute and that no overt act is required.

There is no question but that the statute under which Movant was tried and convicted, neither by word nor implication, requires an overt act in its prohibition against [fol. 33] conspiracy to obstruct commerce by extortion. *Ladner, et al.* v. *United States* (C. A. 5, 1948), 168 F. 2d 771, 773, cert. den. 335 U.S. 827.

The Circuit Court of Appeals for the 8th Circuit has affirmed conviction in cases arising under this very statute, wherein the defendants were sentenced for conspiracy and also for the overt acts of the statute. *Nick, et al.* v. *United States*, 122 F. 2d 660, 669 [12], cert. den. 314 U.S. 687, rehearing denied 314 U.S. 715; *Hulahan* v. *United States*, 214 F. 2d 441, cert. den. 348 U.S. 856.

In *Nick, et al.* v. *United States*, the Court said:

> "We are unable to get the force of the argument that the indictment is duplicitous. The counts in the indictment cover at least two conspiracies: one in connection with extorting money in return for a wage contract, and the other in connection with the employment of the Co-operative Sound Service Supply Company. Also, the indictment involves at least two separate extortion acts: the payment of $6,500.00 and the 'borrowing' of $2,000."

Actually, the elements of a conspiracy are different. A substantive or overt act may be proven without involvement of a conspiracy. "It (a conspiracy) has ingredients, as well as implications, distinct from the completion of the unlawful project." (Parentheses supplied.) *Pinkerton* v. *United States* (supra), l.c. 644.

The Movant says the recent cases[2] show the trend toward a more lenient interpretation of these dual, or duplicitous, acts of Congress, and this Court should take it on itself to follow that trend.

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[2] *Id.* at p. 23.

[fol. 34] A reading of those cases shows a rule of lenity applied where the intention of Congress is not clear. In *Prince* v. *United States*,[2] at l.c. 325, the Chief Justice said:

> "(This case) can and should be differentiated from similar problems in this general field raised under other statutes. The question of interpretation is a narrow one, and our decision should be correspondingly narrow."

This wording leads this Court to believe that each of these type of cases must stand on its own bottom.

In view of the long established holdings that conspiracy may be the subject of trial and sentence in connection with trial and sentence for the overt act, or result, of such conspiracy; in view of the holdings that this may be done in matters where this very act has been in question (*Nick* and *Hulahan* cases, supra); in further view that this exact issue in this particular statute and factual situation has not been passed upon in light of the recent decisions of the Supreme Court; it does not seem reasonable, nor logical, for this trial court to upset the verdict herein on the grounds of illegality of the sentence.

While arguing the "intent of Congress" herein, it might be just as reasonable and logical to say that Congress, at the time it passed this statute, knew of the long line of decisions holding conspiracy and overt acts to be separately punishable and therefore, inserted conspiracy in the Act as a separate crime. Even the use of the word "or" itself, denotes an intention to "separate" or "disjoin".

[fol. 35] There is the further fact that this Movant appealed from the judgment of this Court to the 8th Circuit Court of Appeals; the judgment was affirmed and certiorari denied by the Supreme Court. *Callanan* v. *United States*, supra. If Movant had error to raise in this case, he failed to raise it and it is res judicata. *Lipscomb* v. *United States* (C. A. 8, 1955), 226 F. 2d 812, l.c. 817 [9]. Except for

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[2] *Id.* at p. 23.

Rule 35[4] and Title 28, §2255, U.S.C.[5] he has exhausted his remedies.

Rule 35, F.R.Cr.P. provides that the Court "may correct an illegal sentence at any time". In view of the matters [fol. 36] previously discussed, I hold that both conspiracy and the overt act may be tried and separate sentences imposed under Title 18, §1951, U.S.C., and therefore the sentence is not illegal and that portion of Rule 35 does not apply.

If reduction of sentence is sought by Movant, under the last half of Rule 35 (and actually that is what the long range result of his unique argument comes down to) he is too late as the Court's authority expires within the time limits therein contained.

Therefore Movant cannot have the relief he seeks under Rule 35 for the reasons heretofore stated.

Movant's alternative prayer under Title 28, §2255, U.S.C., raises two additional problems: first, does §2255 apply to this situation and, second, if so, is Movant entitled to relief thereunder?

In 1949 the present §2255 was added to Title 28, which is a part of Chapter 153 on Habeas Corpus. In considering a matter of habeas corpus in *Sunal* v. *Large*, 332 U.S. 174, 177, the Supreme Court said:

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[4] Rule 35 "The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

[5] 28 U.S.C., §2255 (in its applicable parts): "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, etc."

> "The normal and customary method of correcting errors of the trial is by appeal."

The Court was there dealing with and refused to grant the writ to a defendant who failed to appeal. The Court fur- [fol. 37] ther said concerning errors of law committed by a trial court, beginning at l.c. 181:

> "That error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals, and by vesting us with certiorari jurisdiction. • • • If in such circumstances a writ of habeas corpus could be used to correct error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed."

In *Ladner* v. *United States*[2] the question as to the applicability of §2255 was discussed but not determined. At l.c. 172 therein the Court disposed of that issue by saying that the government's contention was not raised before the District Court or the Court of Appeals, and at l.c. 173, the Court said:

> "The question of the scope of collateral attack upon criminal sentences is an important and complex one, judging from the number of decisions discussing it in the District Courts and the Courts of Appeals. We think that we should have the benefit of a full argument before dealing with the question."

The Court then went on to deal with the merits of the judgment and sentence without determining the procedural question. But, Mr. Justice Clark filed a dissenting opinion in which he raised serious doubts as to the permission of collateral attacks upon judgments under §2255. At l.c. 181, he said:

> "It is clear that in enacting §2255, Congress did not intend to enlarge the available grounds for collateral attack, but rather sought only to correct serious ad-

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[2] *Id.* at p. 23.

ministrative problems that had developed in the exercise over the years of habeas corpus jurisdiction."

[fol. 38] Therefore, the majority opinion in *Ladner* aforesaid lends no answer to the problem of whether §2255 applies in these instances and the dissenting opinion indicated that one Justice believes that it did not apply.

The Supreme Court has, however, reached and decided questions of statutory construction, although the questions were raised by collateral attack on consecutive sentences. (See *Gore* [involving §2255] and *Prince* [involving F.R. Cr.P. 35][2]; also *Tinder* v. *United States*, 345 U.S. 565 [§2255]; *Ebeling* v. *Morgan*, 237 U.S. 625 [habeas corpus]; *Morgan* v. *Devine*, 237 U.S. 632 [habeas corpus].)

So, while the Court has refused to definitely say whether §2255 applies in instances of this kind, yet they have considered matters on their merits when presented under that section and under habeas corpus.

Without determining whether §2255 applies, let us look to the section to see what remedy it might afford one who has been tried, convicted, appealed and was refused certiorari, and now, for the first time, raises anew the issue to correct an illegal sentence.

In the first place, the section does not entitle Movant to a hearing, "unless the motion and the files and records of the case conclusively show the prisoner is entitled to relief."

In the next place, the section affords relief to a prisoner "claiming the right to be released." *Heflin* v. *United States*;[3] (for history of §2255, see *United States* v. *Hayman* (1952), 342 U. S. 205.)

[fol. 39] The Movant here is not claiming the right to be released now. By the application of some higher mathematics, known only to himself and counsel, he wants to be released 4 years from now by cutting his sentence under Count I from 12 to 8 years. Yet, the 12 years sentence on Count I is certainly within the limits of the maximum punishment of 20 years. He is only serving "time" on Count I because execution of sentence under Count II was suspended. The Count II sentence has no effect on his "time" now, except to put him on 5 years probation at the conclusion of his sentence.

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[2] *Id.* at p. 23.

Under §2255 the trial court has a duty to review the files and records of the case.[5] From a review of the motion, files and records this Court holds that Movant is not entitled to relief under this section as the record clearly discloses that the Court had jurisdiction, none of his rights were violated in the trial of the case, the judgment was appealed and affirmed and the judgment imposed was within the limits prescribed by the statute under which he was convicted. Therefore, Movant is denied relief on his alternative plea under §2255.

This Court might also call attention of Movant to the ruling of the 8th Circuit Court of Appeals in *Holbrook* v. *United States* (1943), 136 F. 2d 649, wherein the Court at l.c. 652, said:

> "Since neither sentence of itself is invalid by the terms of the statute, and the only invalidity in the situation derives from the constitutional prohibition against double jeopardy or punishment, justice and [fol. 40] reason dictate, in such a case, that the court and not the defendant shall have the right to say which of the two consecutive sentences, * * * shall be eliminated in order not to subject the defendant to the possibility of double punishment."

See also *Garrison* v. *Reeves* (C. A. 8, 1941), 116 F. 2d 978; *Costner* v. *United States* (C. A. 4, 1943), 139 F. 2d 429; *Dimenza* v. *Johnston* (C. A. 9, 1942), 130 F. 2d 465.

Under those rulings it would be for the Court to say which one of the sentences is not proper and which one should be eliminated. It is possible that if a higher court determines the sentence to be improperly imposed that it could further say that the improper sentence was upon Count II.

Clearly, it was the intention of the sentencing judge to impose 12 years imprisonment. It was clear that he intended to impose another 12 years imprisonment but he suspended execution thereon and placed the Movant on probation for 5 years at the conclusion of his sentence under

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[5] *Id.* at p. 27.

Count I. Both the 12 year sentence and the 5 year probation are within the 20 year maximum provided by the statute.

If Movant is released from prison and subsequently violates his probation and is brought in for execution of sentence upon Count II, it would then not be impossible for him to seek relief under the statute or by way of habeas corpus.

As the sentence imposed upon Count I is held to be legal, and within the statutory limits, this Court sees no reason at [fol. 41] this premature date to correct the sentence as to Count II even if it had power to do so under *Holbrook*, supra.

In *United States* v. *Walker* (D.C. N.Y., 1952), 107 F. Supp. 218, it was said:

> "Where legality of judgment of conviction was not questioned and sentence imposed was not in excess of maximum authorized and was not otherwise subject to collateral attack, and petitioner was not claiming right to be released from imprisonment, application for order resentencing petitioner or correcting sentence, * * *, was premature."

To summarize, this Court holds that the sentence imposed upon Movant was not illegal; that Movant is not entitled to relief under Rule 35; that Movant is not entitled to relief under §2255 for the sentence imposed in Count I; that any correction of the sentence upon Count II is premature.

Wherefore, an Order shall be entered denying Movant's Motion and the relief therein sought.

Done this 8th day of May, 1959.

Randolph H. Weber, United States District Judge.

[fol. 42] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 27761

UNITED STATES OF AMERCA, Plaintiff,

—v.—

LAWRENCE CALLANAN, Defendant.

ORDER DENYING MOTION FOR CORRECTION OF SENTENCE—May 8, 1959

This matter is pending upon this defendant's Motion for Correction of Sentence under Count I. A hearing was held thereon with Stipulation and exhibits being filed and the matter was passed for the filing of briefs. The Court has reviewed the briefs of the parties and has reviewed the Motion, files and records of the case. The Court has also written and filed an Opinion herein. And being now fully advised in the premises, it is:

1. Found by the Court that the Motion, files and records of the case conclusively show that said defendant is entitled to no relief;

2. That the sentence imposed upon this defendant is legal;

3. That Movant is not entitled to relief under Rule 35 F.R.Cr.P., and is not entitled to relief under Title 18, §2255, U.S.C. for sentence imposed on Count I;

[fol. 43] 4. That any correction of sentence upon Count II is premature.

Wherefore, it is Ordered that Movant's Motion for Correction of Sentence under Count I be and the same is hereby overruled and the relief therein prayed for is denied.

Done this 8th day of May, 1959.

Randolph H. Weber, United States District Judge.

[fol. 44] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 45]

IN UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 16,293

LAWRENCE CALLANAN, Appellant,

—v.—

UNITED STATES OF AMERICA, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

OPINION—February 2, 1960

Before: Gardner, Woodrough, and Vogel, Circuit Judges.

GARDNER, Circuit Judge:

This is an appeal from an order of the trial court overruling appellant's motion under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in the alternative, under Section 2255, Title 28, United States Code, to correct the sentences imposed on him on July 19, 1954.

On March 3, 1954, the defendant and four others were charged in a two count Indictment. Count One charged

that from March 1, 1951, until the date of the Indictment, defendants did conspire to obstruct, delay, and affect interstate commerce by extortion by obtaining $28,016.18 [fol. 46] from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear. Count two charged that on the same dates defendants did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear, in violation of Section 1951, Title 18, United States Code.

The action was tried to the court and a jury and each defendant was found guilty as charged in the Indictment. Appellant, one of the defendants, was thereupon sentenced to a term of imprisonment for a period of twelve years on Count One and twelve years on Count Two of the Indictment. The term of imprisonment on count Two was made to run consecutively with the term of imprisonment on Count One, but execution of sentence on Count Two was suspended and appellant was placed on probation on Count Two for a period of five years and this term of probation was made to run consecutively with the term of imprisonment imposed on Count One. On appeal the judgment was affirmed. *Callanan et al.* v. *United States,* 8 Cir., 223 F.2d 171. Pursuant to the judgment of conviction appellant commenced service of the sentences imposed upon him and is still in custody under this sentence at the United States Federal Prison at Leavenworth, Kansas. The facts pertinent to the instant proceeding were stipulated and hence are not in dispute. They are substantially as follows:

Defendants were labor union representatives; Callanan for the pipefitters, Bianchi for the operating engineers, Thompson for the teamsters, Poster and Secor for the [fol. 47] laborers. On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four

hours a day for a full day's pay, more men were put on the job than were necessary, and labor costs were higher than for similar work in other comparable regions. In May, 1952, when the Burden Company was getting ready to start upon another project involving the construction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of appellant, he had lunch with appellant alone; that at the luncheon, he told appellant about his difficulties and said that something drastic would have to be done if his company was to complete its project without great loss. He further testified that appellant had asked him how much money there was on the job and whether there would be one cent a foot on the project, a rate which would total $28,000.00 or $29,000.00 on the whole job; that appellant told him that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told appellant that no payment would be made until a substantial portion of the work was done and it was agreed that payments to the defendants would be made by false invoices. Burden also testified that, after the project had been started, at a private meeting with appellant in August, 1952, he complained that defendants were not living up to the agreement, and that appellant assured him that the work would pick up and that he would talk to the other crafts. The Burden Company paid $28,000.00 on [fol. 48] invoices from various companies or individuals. Thompson, Poster, and Secor were shown to have received money from the Washington Equipment & Construction Company which submitted bills to Burden. There was testimony that a friend of appellant set up a fictitious company which sent invoices to the Burden Company. One Sariego testified that appellant called Balch, an international union organizer, and told him to set up a fictitious company, the Pipe Line Welders Supply Company. Pipe Line Welders Supply Company invoices in the amount of $1,606.40 and $1,616.24 were sent to the Burden Company. Burden Corporation checks dated October 14 and October 30, 1952,

each in the amount of $3,791.04, were sent to a mailing address in payment of these invoices. The court in its instructions allowed the jury to return a verdict for both counts of the Indictment.

In his motion, appellant seeks to correct the sentence imposed on Count One of the Indictment on the theory that in fact but one offense was charged or embodied in the two counts of the Indictment and hence the sentences imposed exceeded the maximum penalty of twenty years fixed by the statute, Section 1951, Title 18, United States Code.

In seeking reversal of the order denying his motion, appellant contends that the court erred in overruling his motion to correct the sentence imposed on him on July 19, 1954 because: (1) Congress, in enacting the Hobbs Act, Section 1951, Title 18, United States Code, did not intend that a person be subject to cumulative penalties for the obstruction of commerce by extortion and conspiracy so to do; (2) the sentence under Count One should be corrected; (3) the remedy under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in [fol. 49] the alternative under Section 2255, Title 28, United States Code, is the correct remedy; and (4) appellant is not barred by res judicata from seeking to correct an illegal sentence.

It is the contention of appellant that Count One, which charges a conspiracy to obstruct and delay interstate commerce by extortion, and Count Two, which charges actually obstructing and delaying interstate commerce by extortion, constitute but one offense, the maximum penalty for which, fixed by the so-called Hobbs Act, was twenty years. The question presented is whether the Indictment, though containing two counts, in fact stated but one offense.

When an accused is charged with conspiracy to commit a federal offense in one count and then in a second count is charged with the commission of the substantive offense which is the object of the conspiracy, the Indictment states two offenses, each of which is punishable. *Pinkerton* v. *United States,* 328 U.S. 640; *United States* v. *Rabinowich,* 238 U.S. 78; *Scott* v. *United States,* 10 Cir., 115 F.2d 137; *Hulahan* v. *United States,* 8 Cir., 214 F.2d 441; *Chew* v.

United States, 8 Cir., 9 F.2d 348; *Brown* v. *United States*, 8 Cir., 167 F.2d 772. Answering an argument that a count in an indictment charging a conspiracy to commit an offense and a separate count charging the commission of the offense constituted but one offense, the Supreme Court in *Pinkerton* v. *United States*, supra, said, inter alia:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. • • • The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

[fol. 50] In *Brown* v. *United States*, supra, it was contended, as in this case, that a count in the indictment charging a conspiracy to commit an offense and a separate count charging commission of the offense charged but one offense, punishable as such. In the course of the opinion, referring to this contention, we said:

> "Except in some very limited types of situations (none of which is here involved), the commission of a substantive offense and a conspiracy to commit it are distinct crimes and may be separately charged and punished. *Pinkerton* v. *United States*, 328 U.S. 640, 643, 644, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489; *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787-789, 66 S.Ct. 1125, 1128, 1129, 90 L.Ed. 1575. And the substantive offense may be charged and punished as a distinct crime, even though the conspiracy charge also sets out the facts involved in the substantive offense as an overt act of the conspiracy. *United States* v. *Bayer*, 331 U.S. 532, 542, 543, 67 S.Ct. 1394, 1399, 91 L.Ed. 1654."

The same principle is announced in *Scott* v. *United States*, supra, as follows:

> "Although the indictment was not attacked in the trial court by demurrer or motion to quash, the con-

tention is advanced here that it was fatally defective in that appellant and five others were charged in one count with the crime of conspiracy to commit perjury, and appellant alone was charged in the other count with the substantive offense of perjury. It is urged that this constitutes an improper joinder of charges. It is well settled that a conspiracy to commit a crime and the substantive crime of which the conspiracy is the object may be laid as separate counts in a single indictment, and that sentence may be imposed upon each count."

Appellant relies strongly on *United States* v. *Universal C. I. T. Corp.*, 344 U.S. 218, *Prince* v. *United States*, 352 [fol. 51] U.S. 322, *Bell* v. *United States*, 349 U.S. 81, *Ladner* v. *United States*, 358 U.S. 169, and *Heflin* v. *United States*, 358 U.S. 415, in which the Court held that there was only one offense and one sentence permissible, under the rule of lenity. The cases are readily distinguishable. Thus, in the *Universal, Prince, Ladner,* and *Bell* cases, no conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another, while in the *Heflin* case, there was no contention that defendant could not get a separate sentence under the conspiracy count. These cases involved either completed attempts or crimes affecting several persons.

We conclude that the sentences involved were not illegal sentences and Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, authorizing the correction only of an "illegal sentence", cannot be invoked.

As to the rights of appellants as determined by Section 2255, Title 28, United States Code, it is noted that this section refers to a claim of "right to be released." It is to be noted that appellant does not claim the right to be released. He admits that he has served only four years of a sentence which he claims should be fixed at eight years. He is, therefore, not entitled to any relief under Section 2255, supra.

Appellant's motion, whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him

on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion. *Taylor* v. *United States*, 8 Cir., 229 F.2d 826; *Shobe* v. *United States*, 8 Cir., 220 F.2d 928; *Burns* v. *United States*, 8 Cir., 229 F.2d 87; *Kaplan* v. *United States*, 8 Cir., 234 F.2d 345; *Hickman* v. *United States*, 8 Cir., 246 [fol. 52] F.2d 178. In the instant case there was an appeal and the judgment was affirmed. *Callanan, et al.* v. *United States*, 8 Cir., 223 F.2d 171. That affirmance covered not only the questions actually raised but also the questions that might have been raised. *Lipscomb* v. *United States*, 8 Cir., 226 F.2d 812; *Mitchell* v. *Village Creek Drainage Dist.*, 8 Cir., 158 F.2d 475. What is said by us in *Lipscomb* v. *United States*, supra, is here apposite. In the course of the decision in that case we, among other things, said:

> " • • • the contentions now presented could have been urged in that proceeding as there is no claim that they arose subsequent thereto and the decision in that proceeding is binding on the defendant not only as to the contentions there made but as to all other contentions which could have been made.
>
> "In the course of our opinion in *Mitchell* v. *Village Creek Drainage Dist.*, 8 Cir., 158 F.2d 475, 477, it is said:
>
> "'It is elementary that res judicata may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as to any other available matter which might have been presented to that end. *Stevens* v. *Shull*, 179 Ark. 766, 19 S.W.2d 1018, 64 A.L.R. 1258; *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 64 S.Ct. 317, 84 L.Ed. 329; *Jackson* v. *Irving Trust Co.*, 311 U.S. 494, 61 S.Ct. 326, 85 L.Ed. 297; *Billings Utility Co.* v. *Advisory Committee Board of Governors*, 8 Cir., 135 F.2d 108; *Kithcart* v. *Metropolitan Life Ins. Co.*, 8 Cir., 119 F.2d 497; *McIntosh* v. *Wiggins*, 8 Cir., 123 F.2d 316; *Howard* v. *Chicago, B. & Q. R. Co.*, 8 Cir., 146 F.2d 316. The rule is succinctly stated in 30 American Jurisprudence, Sec. 179, at page 923, as follows:

"'"The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application that a de- [fol. 53] termination of the questions involved in the prior action; the conclusiveness of the judgment in each case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense, which could have been presented by the exercise of due diligence."'

"We have specifically held that the doctrine of res judicata is applicable to a proceeding under Title 28 U.S.C. §2255."

We are of the view that the present proceeding cannot now be maintained but is barred under the doctrine of res judicata.

Being of the view that, for the foregoing reasons, the order appealed from must be affirmed, further discussions of appellant's contentions would unduly extend this opinion and serve no useful purpose. The order appealed from is therefore affirmed.

[fol. 54]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16293—September Term, 1959

LAWRENCE CALLANAN, Appellant,

—v.—

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGMENT—February 2, 1960

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

February 2, 1960.

[fol. 55] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 752—October Term, 1959

LAWRENCE CALLANAN, Petitioner,

—v.—

UNITED STATES.

ORDER ALLOWING CERTIORARI—April 4, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 752 47

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on February 2, 1960.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix, infra, p. 13) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 2, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether Congress intended that a person be subject to cumulative penalties for a single interference of interstate commerce by extortion and for conspiracy "so to do," under the Hobbs Act, 18 U. S. C. 1951, which statute makes both a conspiratorial and a substantive interference with commerce a crime and provides a twenty year penalty.

(2) Whether the doctrine of res judicata bars a criminal defendant from collaterally attacking an illegal sentence of imprisonment in excess of that authorized by law when on his direct appeal from his conviction he failed to urge a question as to the legality of his sentence.

STATUTE AND RULE INVOLVED.

62 Stat. 793, 18 U. S. C., § 1951, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the

presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

* * * * * * * *

Rule 35 of the Federal Rules of Criminal Procedure provides:

The court may correct an illegal sentence at any time * * *

STATEMENT.

Petitioner was convicted in the United States District Court for the Eastern District of Missouri on a two count indictment for conspiring to obstruct interstate commerce by extortion and for obstructing interstate commerce by extortion. He was sentenced to imprisonment for a period

of 12 years on each count, the sentences to run consecutively for a total sentence of 24 years. The execution of the 12-year sentence on the second count was suspended and petitioner was placed on probation on this count, with the period of probation to run consecutively with the term of imprisonment imposed on the first count.

Count one charged that from March 1, 1951, until the date of the indictment (March 3, 1954), petitioner and four others did conspire to obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear. Count two charged that on the same dates petitioner and his co-defendants did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear. The statute alleged to be violated in each count was 18 U. S. C., 1951 (R. 35-44).

The action was tried to the Court and a jury and each defendant was found guilty as charged in the indictment. On June 3, 1955, the judgment was affirmed by the appellate court. **Callanan v. United States**, 8 Cir., 223 F. 2d 171. Pursuant to the judgment of conviction petitioner commenced service of the sentence imposed upon him and is still in custody under this sentence at the United States Federal Prison at Leavenworth, Kansas (R. 7).

On December 17, 1958, petitioner filed a motion for correction of sentence under Rule 35, F. R. Crim. P., or, in the alternative, under 28 U. S. C. 2255 asking that his sentence be corrected on the ground that Congress did not intend that a person be subject to two penalties for obstruction of commerce by extortion and by conspiracy

so to do (R. 2-4).* The facts pertinent to the instant proceedings were stipulated and showed that the indictment involved an interference with a pipe line project (R. 5-7). After a hearing (R. 8-16), the District Court denied the motion (R. 17-32). The Court of Appeals affirmed (Appendix p. 13), holding that the issue could have been raised on direct appeal and, therefore, could not be relitigated. The Court also held that "when an accused is charged with conspiracy to commit a federal offense on one count and then in a second count is charged with the commission of a substantive offense which is the object of the conspiracy, the indictment states two offenses each of which is punishable. **Pinkerton v. United States**, 328 U. S. 640; **United States v. Rabinowich**, 238 U. S. 78 * * *." The Court distinguished **United States v. Universal C. I. T. Corp.**, 344 U. S. 218, **Prince v. United States**, 352 U. S. 322, **Bell v. United States**, 349 U. S. 81, **Ladner v. United States**, 358 U. S. 169, and **Heflin v. United States**, 358 U. S. 415, saying:

> "Thus, in **Universal, Prince, Ladner** and **Bell** cases, no conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another, while in the **Heflin** case, there was no contention that defendant could not get a separate sentence under the conspiracy count. These cases involved either completed attempts or crimes affecting several persons."

The Court rejected petitioner's argument that the wording of the statute and its legislative history were at best

* While the motion asked that the sentence be corrected under Count 1, the rule of the Eighth Circuit is that a court, if a sentence is excessive, may order the sentence under either count vacated even if relief is asked on one count only. Holbrook v. United States, 8 Cir., 136 F. 2d 649. The District Court considered the issue as to whether the sentence on either count should be corrected and concluded that any correction under Count 2 was premature.

equivocal and that under such circumstances the congressional intent being ambiguous the rule of lenity should be applied.

REASONS FOR GRANTING THE WRIT.

1. The Court below assumed that since Congress has the power to punish separately the commission of a substantive offense and a conspiracy to commit the substantive offense[1] that Congress therefore intended that such double punishment may be imposed. In reaching this conclusion the Court misinterpreted the essence of the lenity cases. In all those cases, after it was conceded or decided that Congress had the power to provide for cumulative punishment for offenses arising out of a single factual situation, the question resolved itself to the issue as to whether Congress intended that consecutive punishment might be imposed. While the lenity cases involved substantive crimes, the same problem of Congressional intent is applicable when a single statute proscribes against concerted or individual conduct. The fact that a commission of a substantive offense and a conspiracy to commit it may be separate and distinct crimes and that Congress, if it wishes can provide that such offenses be either punished singly or cumulatively does not mean that Congress when it enacted the instant statute intended that a defendant be punished doubly for both a substantive offense and a conspiracy. We do not here have a case where the conspiracy arises under the general conspiracy statute, 18 U. S. C. 371 and the substantive offense under a separate statute enacted at a different time. Rather, we have a situation where Congress chose to enact a single statute to cover all forms of unlawful interferences with commerce.

The single statute here involved is the Hobbs Act, 18 U. S. C., § 1951, which makes it a crime to unlawfully inter-

[1] Pinkerton v. United States, 328 U. S. 640.

fere with interstate commerce. It is petitioner's position that there can be but a single punishment for a single interference with commerce, whether the acts affecting interstate commerce amount to a conspiracy in restraint of such commerce or not. This is so because Congress did not intend to punish separately the obstruction of commerce by extortion and the conspiracy to so obstruct commerce. Rather the substantive provisions were included to avoid the limitations of the Sherman Anti-Trust Act and to cover all restraints of commerce, whether in the form of conspiracies or not.

An examination of this statute known as the Anti-Racketeering Act in the light of its legislative history suggests the application of the rule of lenity. Originally it was enacted in 1934.[2] It was amended in 1946 by the Hobbs Act.[3] It was modified again in 1948 when the entire criminal code, Title 18, was enacted into positive law.[4] The legislative history as to punishment is meager. But there is nothing to suggest that Congress intended by this single statute multiple punishment for the obstruction of commerce by extortion and for conspiracy so to do.

Section 2 of the 1934 Act made it a crime for any person who in connection with any act affecting commerce "(a) obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money . . ." or "(b) obtains the property of another, with his consent induced by wrongful use of force or fear . . ." or "(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b);" or "(d) conspires or acts concertedly with any other person or persons to commit any

[2] Act of June 18, 1934, c. 569, §§ 1-6, 48 Stat. 979, 980.

[3] Act of July 3, 1946, c. 537, 60 Stat. 420.

[4] Act of June 25, 1948, c. 645, 62 Stat. 793.

of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both" (Appendix p. 23). There was an overlap in each of the subsections. Obtaining property by wrongful use of fear covered by subsection (b) embraces obtaining money by coercion covered by subsection (a). A person who threatens to commit an act of physical injury in furtherance of a purpose under subsection (c) is attempting by the use of force to obtain money under subsection (a). A plan under subsection (c) overlaps the conspiracy under subsection (d). A person who acts concertedly under subsection (d) would also violate the other subsections. It seems more reasonable to conclude that Congress by enacting these subsections meant to cover all types and variety of offender rather than to multiply punishment if a particular violator happened to violate more than a single subsection and that Congress intended, by the wording of the statute, a single punishment for conspiracy and for a violation of this act involving a single interference with commerce.

The purpose of the Anti-Racketeering Act is set forth in the committee report as follows (S. Rep. No. 532, 73d Cong., 2d Session 1-2):

> S. 2248 (H. R. 6926), a bill to protect trade and commerce against interference by violence, threats, coercion, or intimidation. This is a proposed Federal anti-racketeering statute based on the interstate commerce power.
>
> In the past such persons have been prosecuted in the Federal courts for incidental violations of law, such as mail frauds or income-tax evasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Anti-trust Act. This act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because

of the many limitations engrafted upon the act by interpretations of the courts, the act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion. Furthermore, the Sherman Act requires proof of a conspiracy, combination, or monopoly, and it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce, or a monopoly. Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce.

The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers. Such restraints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, whether the restraints are in form of conspiracies or not. The proposed statute also makes it a felony to do any act "affecting" or "burdening" such trade or commerce if accompanied by extortion, violence, coercion, or intimidation.

It may be concluded that this Act was initially enacted to cover situations not embraced by the Sherman Act, that its purpose was to provide more severe penalties than provided by that law and that it was designed to cover circumstances where it was difficult to prove conspiracy or combination. There is no indication that Congress intended to punish a single interference doubly if done in combination.

Other legislative history relative to the 1934 Act, is meager. It was passed in the Senate without debate and

without division. In the House the debate was limited to less than a column of the Congressional Record and consisted of one member's demanding and receiving assurance that an exemption for labor was applicable and was satisfactory to organized labor.[5]

The 1946 Act defined commerce, robbery and extortion. Section 2 stated that it was a crime to obstruct commerce by robbery or extortion. Sections 3, 4 and 5 made it a crime "to do anything in violation of Section 2." Section 3 covered those who conspire or act in concert with others, Section 4 included those who attempt or participate in an attempt, and Section 5 embraced those who commit or threat physical violence to any person or property in furtherance of a plan or purpose (Appendix p. 26). Again there is the same overlap in these sections as in the 1934 Act. The most significant change was the elimination of the labor exemption. The purpose of the 1946 amendment was designed to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship.[6] The committee reports and debates relative to the 1946 amendment merely considered the Local 807 case.[7]

The 1948 Act, which is applicable here, substituted the words "attempts or conspires so to do" for the wording of the 1946 Act and omitted as unnecessary the words "participate in an attempt" and the words "or acts in concert with another or with others." See Revisor's note to 18 U. S. C. 1951.

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[5] 78 Cong. Rec. 11402-11403 (1934). See *United States v. Local 807*, 315 U. S. 521.

[6] *United States v. Green*, 350 U. S. 415, 418-419.

[7] H. R. Rep. No. 238, 79 Cong., 1st Sess.; S. Rep. No. 1516, 79 Cong., 2d Sess.; 91 Cong. Rec. 11899-11922 (1945). It was also stated that the definitions of extortion and robbery were modeled after New York Law. 91 Cong. Rec. 11900-11906 (1945); see also *United States v. Nedley*, 2 Cir., 255 F. 2d 350.

The fact that the government is seeking to uphold multiple punishment under a single statute rather than under several statutes is of significance as indicating an attitude of lenity on the part of Congress. See **Gore v. United States**, 357 U. S. 386, 391. The heavy penalty provision of twenty years is another factor indicating that Congress did not intend to pyramid penalties. At least the congressional intent as to cumulative punishment is ambiguous and therefore the policy of lenity should be applicable. **Bell v. United States**, 349 U. S. 81, 83-84; **Ladner v. United States**, 358 U. S. 169; **Heflin v. United States**, 358 U. S. 415.

It is clear that the court below has decided an important federal question in a way in conflict with the applicable decisions of this Court. Instead of seeking to ascertain the intent of Congress, the appellate court erroneously equated power with intent.

2. The Court below held: "Appellant's motion whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion." The Court ignored the fact that Rule 35 provides that "the Court may correct an illegal sentence at any time." Moreover, this holding conflicts with the decision of this Court in **Heflin v. United States**, 358 U. S. 415, 417-418, which, as the petitioner argued below, impliedly finds the doctrine of res judicata inapplicable. Indeed in that case this Court even said that "successive motions may be made under Rule 35." This Court in other instances has reached and decided issues concerning the legality of the length of a sentence, although the questions were raised by collateral attack on consecutive sentences. **Prince v. United States**, 352 U. S. 322; **Gore v. United States**, 357 U. S. 386. In

Heflin, the defendant had taken a direct appeal as did petitioner in this case. 223 F. 2d 371. In **Prince** and **Gore**, the defendants had been tried and convicted but did not institute a direct appeal. We see, however, no distinction between a defendant who appeals and one who does not directly appeal his conviction. Both could have litigated any question concerning the length of their sentence on direct appeal. One reason why defendants in both categories may litigate that issue on collateral attack is that such a sentence may be corrected "at any time." It would be unjust to imprison any individual beyond the length of time that Congress had designated as the maximum period for a certain type of wrongful conduct.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

OPINION OF COURT OF APPEALS.

United States Court of Appeals
For the Eighth Circuit.

No. 16,293

Lawrence Callanan, Appellant, v. United States of America, Appellee.	Appeal from the United States District Court for the Eastern District of Missouri.

[February 2, 1960.]

Before Gardner, Woodrough, and Vogel, Circuit Judges.

Gardner, Circuit Judge.

This is an appeal from an order of the trial court overruling appellant's motion under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in the alternative, under Section 2255, Title 28, United States Code, to correct the sentences imposed on him on July 19, 1954.

On March 3, 1954, the defendant and four others were charged in a two count Indictment. Count One charged that from March 1, 1951, until the date of Indictment, de-

fendants did conspire to obstruct, delay, and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear. Count Two charged that on the same dates defendants did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence, and fear, in violation of Section 1951, Title 18, United States Code.

The action was tried to the court and a jury and each defendant was found guilty as charged in the Indictment. Appellant, one of the defendants, was thereupon sentenced to a term of imprisonment for a period of twelve years on Count One and twelve years on Count Two of the Indictment. The term of imprisonment on Count Two was made to run consecutively with the term of imprisonment on Count One, but execution of sentence on Count Two was suspended and appellant was placed on probation on Count Two for a period of five years and this term of probation was made to run consecutively with the term of imprisonment imposed on Count One. On appeal the judgment was affirmed. **Callanan et al. v. United States**, 8 Cir., 223 F. 2d 171. Pursuant to the judgment of conviction appellant commenced service of the sentences imposed upon him and is still in custody under this sentence at the United States Federal Prison at Leavenworth, Kansas. The facts pertinent to the instant proceeding were stipulated and hence are not in dispute. They are substantially as follows:

Defendants were labor union representatives; Callanan for the pipefitters, Bianchi for the operating engineers, Thompson for the teamsters, Poster and Secor for the

laborers. On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four hours a day for a full day's pay, more men were put on the job than were necessary, and labor costs were higher than for similar work in other comparable regions. In May, 1952, when the Burden Company was getting ready to start upon another project involving the construction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of appellant, he had lunch with appellant alone; that at the luncheon, he told appellant about his difficulties and said that something drastic would have to be done if his company was to complete its project without great loss. He further testified that appellant had asked him how much money there was on the job and whether there would be one cent a foot on the project, a rate which would total $28,000.00 or $29,000.00 on the whole job; that appellant told him that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told appellant that no payment would be made until a substantial portion of the work was done and it was agreed that payments to the defendants would be made by false invoices. Burden also testified that, after the project had been started, at a private meeting with appellant in August, 1952, he complained that defendants were not living up to the agreement, and that appellant assured him that the work would pick up and that he would talk to the other crafts. The Burden Company paid $28,000.00 on invoices from various companies or individuals. Thompson, Poster, and Secor were shown to have received money from

the Washington Equipment & Construction Company which submitted bills to Burden. There was testimony that a friend of appellant set up a fictitious company which sent invoices to the Burden Company. One Sariego testified that appellant called Baleh, an international union organizer, and told him to set up a fictitious company, the Pipe Line Welders Supply Company. Pipe Line Welders Supply Company invoices in the amount of $1,606.40 and $1,616.24 were sent to the Burden Company. Burden Corporation checks dated October 14 and October 30, 1952, each in the amount of $3,791.04, were sent to a mailing address in payment of these invoices. The court in its instructions allowed the jury to return a verdict for both counts of the Indictment.

In his motion, appellant seeks to correct the sentence imposed on Count One of the Indictment on the theory that in fact but one offense was charged or embodied in the two counts of the Indictment and hence the sentences imposed exceeded the maximum penalty of twenty years fixed by the statute, Section 1951, Title 18, United States Code

In seeking reversal of the order denying his motion, appellant contends that the court erred in overruling his motion to correct the sentence imposed on him on July 19, 1954 because: (1) Congress, in enacting the Hobbs Act, Section 1951, Title 18, United States Code, did not intend that a person be subject to cumulative penalties for the obstruction of commerce by extortion and conspiracy so to do; (2) the sentence under Count One should be corrected; (3) the remedy under Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, or in the alternative under Section 2255, Title 28, United States Code, is the correct remedy; and (4) appellant is not barred by res judicata from seeking to correct an illegal sentence.

It is the contention of appellant that Count One, which charges a conspiracy to obstruct and delay interstate commerce by extortion, and Count Two, which charges actually obstructing and delaying interstate commerce by extortion, constitute but one offense, the maximum penalty for which, fixed by the so-called Hobbs Act, was twenty years. The question presented is whether the Indictment, though containing two counts, in fact stated but one offense.

When an accused is charged with conspiracy to commit a federal offense in one count and then in a second count is charged with the commission of the substantive offense which is the object of the conspiracy, the Indictment states two offenses, each of which is punishable. **Pinkerton v. United States**, 328 U. S. 640; **United States v. Rabinowich**, 238 U. S. 78; **Scott v. United States**, 10 Cir., 115 F. 2d 137; **Hulahan v. United States**, 8 Cir., 214 F. 2d 441; **Chew v. United States**, 8 Cir., 9 F. 2d 348; **Brown v. United States**, 8 Cir., 167 F. 2d 772. Answering an argument that a count in an indictment charging a conspiracy to commit an offense and a separate count charging the commission of the offense constituted but one offense, the Supreme Court in **Pinkerton v. United States**, supra, said, inter alia:

> "Nor can we accept the proposition that the substantive offenses were merged in the conspiracy. * * * The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has long been consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

In **Brown v. United States**, supra, it was contended, as in this case, that a count in the indictment charging a conspiracy to commit an offense and a separate count charging commission of the offense charged but one offense.

punishable as such. In the course of the opinion, referring to this contention, we said:

> "Except in some very limited types of situations (none of which is here involved), the commission of a substantive offense and a conspiracy to commit it are distinct crimes and may be separately charged and punished. **Pinkerton v. United States,** 328 U. S. 640, 643, 644, 66 S. Ct. 1180, 1182, 90 L. Ed. 1489; **American Tobacco Co. v. United States,** 328 U. S. 781, 787-789, 66 S. Ct. 1125, 1128, 1129, 90 L. Ed. 1575. And the substantive offense may be charged and punished as a distinct crime, even though the conspiracy charge also sets out the facts involved in the substantive offense as an overt act of the conspiracy. **United States v. Bayer,** 331 U. S. 532, 542, 543, 67 S. Ct. 1394, 1399, 91 L. Ed. 1654."

The same principle is announced in **Scott v. United States,** supra, as follows:

> "Although the indictment was not attacked in the trial court by demurrer or motion to quash, the contention is advanced here that it was fatally defective in that appellant and five others were charged in one count with the crime of conspiracy to commit perjury, and appellant alone was charged in the other count with the substantive offense of perjury. It is urged that this constitutes an improper joinder of charges. It is well settled that a conspiracy to commit a crime and the substantive crime of which the conspiracy is the object may be laid as separate counts in a single indictment, and that sentence may be imposed upon each count."

Appellant relies strongly on **United States v. Universal C. I. T. Corp.,** 344 U. S. 218; **Prince v. United States,** 352 U. S. 322; **Bell v. United States,** 349 U. S. 81; **Ladner v.**

United States, 358 U. S. 169; and **Heflin v. United States**, 358 U. S. 415, in which the Court held that there was only one offense and one sentence permissible, under the rule of lenity. The cases are readily distinguishable. Thus, in the **Universal**, **Prince**, **Ladner**, and **Bell** cases, no conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another, while in the **Heflin** case, there was no contention that defendant could not get a separate sentence under the conspiracy count. These cases involved either completed attempts or crimes affecting several persons.

We conclude that the sentences involved were not illegal sentences and Rule 35, Federal Rules of Criminal Procedure, Title 18, United States Code, authorizing the correction only of an "illegal sentence", cannot be invoked.

As to the rights of appellants as determined by Section 2255, Title 28, United States Code, it is noted that this section refers to a chain of "right to be released." It is to be noted that appellant does not claim the right to be released. He admits that he has served only four years of a sentence which he claims should be fixed at eight years. He is, therefore, not entitled to any relief under Section 2255, supra.

Appellant's motion, whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion. **Taylor v. United States**, 8 Cir., 229 F. 2d 826; **Shobe v. United States**, 8 Cir., 220 F. 2d 928; **Burns v. United States**, 8 Cir., 229 F. 2d 87; **Kaplan v. United States**, 8 Cir., 234 F. 2d 345; **Hickman v. United States**, 8 Cir., 246 F. 2d 178. In the instant case there was an appeal and the judgment was affirmed. **Callanan et al. v. United States**,

8 Cir., 223 F. 2d 171. That affirmance covered not only the questions actually raised but also the questions that might have been raised. **Lipscomb v. United States**, 8 Cir., 226 F. 2d 812; **Mitchell v. Village Creek Drainage Dist.**, 8 Cir., 158 F. 2d 475. What is said by us in **Lipscomb v. United States**, supra, is here apposite. In the course of the decision in that case we, among other things, said:

"* * * the contentions now presented could have been urged in that proceeding as there is no claim that they arose subsequent thereto and the decision in that proceeding is binding on the defendant not only as to the contentions there made but as to all other contentions which could have been made.

"In the course of our opinion in **Mitchell v. Village Creek Drainage Dist.**, 8 Cir., 158 F. 2d 475, 477, it is said:

" 'It is elementary that res judicata may be pleaded as a bar not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as to any other available matter which might have been presented to that end. **Stevens v. Shull**, 179 Ark. 766, 19 S. W. 2d 1018, 64 A. L. R. 1258; **Chicot County Drainage Dist. v. Baxter State Bank**, 308 U. S. 371, 64 S. Ct. 317, 84 L. Ed. 329; **Jackson v. Irving Trust Co.**, 311 U. S. 494, 61 S. Ct. 326, 85 L. Ed. 297; **Billings Utility Co. v. Advisory Committee Board of Governors**, 8 Cir., 135 F. 2d 108; **Kithcart v. Metropolitan Life Ins. Co.**, 8 Cir., 119 F. 2d 497; **McIntosh v. Wiggins**, 8 Cir., 123 F. 2d 316; **Howard v. Chicago, B. & Q. R. Co.**, 8 Cir., 146 F. 2d 316. The rule is succinctly stated in 30 American Jurisprudence, Sec. 179, at page 923, as follows:

" ' "The phase of the doctrine of res judicata precluding subsequent litigation of the same cause of action is much broader in its application that a deter-

mination of the questions involved in the prior action; the conclusiveness of the judgment in each case extends not only to matters actually determined, but also to other matters which could properly have been determined in the prior action. This rule applies to every queston falling within the purview of the original action, in respect to matters of both claim and defense, which could have been presented by the exercise of due diligence."

"We have specifically held that the doctrine of res judicata is applicable to a proceeding under Title 28, U. S. C., § 2255."

We are of the view that the present proceeding cannot now be maintained but is barred under the doctrine of res judicata.

Being of the view that, for the foregoing reasons, the order appealed from must be affirmed, further discussions of appellant's contentions would unduly extend this opinion and serve no useful purpose. The order appealed from is therefore affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

(JUDGMENT.)

United States Court of Appeals
for the
Eighth Circuit.

No. 16293 - - - September Term, 1959.

Lawrence Callanan, Appellant.

vs.

United States of America.

Appeal from the United States District Court
for the Eastern District of Missouri.

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

February 2, 1960.

Act of June 18, 1934, 48 Stat. 979.

AN ACT.

To protect trade and commerce against interference by violence, threats, coercion, or intimidation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia,

in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations or the purchase or rental of property or protective services not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

Sec. 3. (a) As used in this Act the term "wrongful" means in violation of the criminal laws of the United States of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.

Sec. 4. Prosecutions under this Act shall be commenced only upon the express direction of the Attorney General of the United States.

Sec. 5. If any provisions of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Sec. 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: **Provided**, That no court of the United States shall construe or apply any of the provisions of this Act in such manner as to impair, diminish, or in any manner affect the rights of bona-fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

Act of July 3, 1946, 60 Stat. 420.

AN ACT.

To amend the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to protect trade and commerce against the interference by violence, threats, coercion, or intimidation", approved June 18, 1934 (48 Stat. 979; U. S. C., 1940 edition, title 18, secs. 420a-420e), be, and it is hereby amended to read as follows:

TITLE I.

Sec. 1. As used in this title—

(a) The term "commerce" means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term "Territory" means any Territory or possession of the United States.

(b) The term "robbery" means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(c) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

SEC. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both.

TITLE II.

Nothing in this Act shall be construed to repeal, modify, or affect either section 6 or section 20 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, or an Act entitled "An Act to amend the judicial code and to define and limit the jurisdiction of the courts in equity, and for other purposes", approved March 23, 1932, or an Act entitled "An Act to provide for the prompt disposition of disputes between carriers and their employees, and for other purposes", approved May 20, 1926, as amended, or an Act entitled "An Act to diminish the causes of labor disputes burdening or obstructing interstate or foreign commerce, to create a National Labor Relations Board, and for other purposes", approved July 5, 1935.

FILE COPY

No. 47

In the Supreme Court of the United States

OCTOBER TERM, 1959

LAWRENCE CALLANAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM RICHARD WILKEY,
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OCTOBER TERM, 1959

No. 752

LAWRENCE CALLANAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 13-21) has not yet been reported. The opinion of the district court is reported at 173 F. Supp. 98.

JURISDICTION

The judgment of the Court of Appeals was entered February 2, 1960. The petition for a writ of certiorari was filed March 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the validity of consecutive sentences on two counts of an indictment, alleged to state only one offense, may be raised by a motion under Rule 35, F.R. Crim. P., after affirmance of the conviction.[1]

2. Whether conspiracy to violate the Hobbs Act and a substantive offense thereunder are separate offenses for which consecutive sentences may be imposed.

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part as follows:

> (a) Whoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

STATEMENT

The petitioner was convicted in the United States District Court for the Eastern District of Missouri on a two-count indictment charging in Count One conspiracy with others to obstruct interstate commerce by extortion and in Count Two obstructing interstate commerce by extortion, both in violation

[1] On this issue the government agrees with petitioner that the question may be raised by a motion under Rule 35 since the contention is based on the face of the indictment.

of 18 U.S.C. 1951. On July 19, 1954, he was sentenced to imprisonment for twelve years on each count, to run consecutively, but with sentence on the second count suspended and the petitioner placed on probation for five years on that count. The conviction was affirmed on appeal. 223 F. 2d 171, certiorari denied, 350 U.S. 862.

On December 17, 1958, the petitioner filed a motion for correction of sentence, arguing that both counts charged only one offense; that he could therefore be sentenced on the two counts to a maximum of only 20 years; and that, for this reason, his sentence on the first count should be reduced to eight years. The district court denied the motion, holding that the two counts charged separate offenses and that the sentence imposed was not illegal. It pointed out that, in any event, the petitioner would not have been entitled to the reduction of his prison term. It considered separately the question of whether the petitioner would be entitled to relief under 28 U.S.C. 2255 and ruled that there was no illegality in the sentence under Count One; and that any attempt to attack the suspended sentence under Count Two under 28 U.S.C. 2255 was premature since petitioner was not in custody under that sentence, 173 F. Supp. 98. The Court of Appeals affirmed, holding that the two counts charged separate offenses. It also stated that the proceeding could not be maintained because the issue was one which could have been, but was not, raised on appeal (Pet. App. 13-21).

ARGUMENT

1. This Court has held that, where it appears from the face of an indictment and judgment that a sentence is illegal, either because it is excessive or because it involves double punishment for the same offense, the error is one which may be corrected on collateral attack. This was established as far back as *Ex parte Lange*, 18 Wall. 163, and *In re Snow*, 120 U.S. 274. Since the enactment of Rule 35, F.R. Crim. P., it has been held that such a motion to correct lies under the rule when the claim of illegality is based on the face of the indictment. *Heflin* v. *United States*, 358 U.S. 415, 418, 422. Accordingly, although the petitioner could have raised the issue on direct appeal, we do not dispute his contention that he is now in a position to argue that the sentence is illegal under Rule 35 in that the claimed illegality appears from the face of the indictment and judgment.[2]

Both courts below, however, considered the validity of the petitioner's contentions as well as his standing. The ruling that the petitioner had no standing to raise the issue does not warrant further review in this case, since, as we discuss below, the courts below were correct in their conclusion that the petitioner's attack upon his sentence was without merit.

---

[2] In this case the petitioner's motion would not lie under 28 U.S.C. 2255 since it is evident that, even if his legal argument had validity, it would not result in his release from imprisonment for twelve years, under count I. *Heflin* v. *United States*, 358 U.S. 415. The most that he could obtain would be the elimination of the consecutive, suspended sentence under count II.

2. The petitioner recognizes that there have been numerous decisions by this Court that conspiracy to commit a crime is separate from the crime itself. *Clune* v. *United States*, 159 U.S. 590; *Heike* v. *United States*, 227 U.S. 131; *United States* v. *Stevenson*, 215 U.S. 200, 203; *United States* v. *Rabinowich*, 238 U.S. 78, 85; *United States* v. *Bayer*, 331 U.S. 532, 541-543; *Sealfon* v. *United States*, 332 U.S. 575, 578. This principle has been applied specifically to the situation where separate punishments have been imposed on counts charging conspiracy and the substantive offense. *Carter* v. *McClaughry*, 183 U.S. 365, 395; *Pinkerton* v. *United States*, 328 U.S. 640, 643; see *Pereira* v. *United States*, 347 U.S. 1.

The petitioner argues that these rulings should nevertheless not be applied in his case because here the crime of conspiracy is defined, not in a separate statute, but in the same statute which prohibits the substantive offense. There is no warrant for this construction. The specific prohibition against conspiracy in this section was necessary to authorize the heavier punishment for that offense which this statute fixes, as against the five year punishment of the general conspiracy statute, 18 U.S.C. 371, and two years under former 18 U.S.C. (1946 ed.) 88. There is no reason to believe that Congress had any other purpose in mind. When Congress passed the predecessor statutes, the Anti-Racketeering Law of 1934 (48 Stat. 979) and the Hobbs Act of 1946 (60 Stat. 420), and indeed when this statute was included in the revision of Title 18 in 1948, the doctrine that

conspiracy and the substantive offense are separately punishable was unquestioned. There is thus no reason to believe that Congress intended a different rule to be applied to the offenses it created by these statutes than was applicable generally.

In so far as the legislative history tends to cast any light on the problem, it supports the view that Congress intended conspiracy to be a separate crime. As originally enacted the Act of June 18, 1934 provided that any person who in connection with an act affecting commerce:

> (a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or
>
> (b) Obtains the property of another, with his consent, induced by wrongful use or force or fear, or under color of official right; or
>
> (c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or
>
> (d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

The Hobbs Act even more clearly separately defined the various offenses under the statute as follows:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

The organization of the statute before codification makes it clear that Congress intended to make conspiracy to violate the substantive provisions a separate crime.

Particularly in relation to the crime here involved, there would be good reason for Congress to believe that concert of action was itself sufficiently serious to be subject to separate punishment. As this Court said in *United States* v. *Rabinowich*, 238 U.S. 78, 88, quoted with approval in *Pinkerton* v. *United States*, 328 U.S. at p. 644:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. * * *

That would certainly be true of interference with interstate commerce by extortion.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

MARCH 1960

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No. 47

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

ARGUMENT.

The Government argues that the "specific prohibition against conspiracy in this section was necessary to authorize the heavier punishment for that offense which this statute fixes, as against the five year punishment of the

general conspiracy statute, 18 U. S. C. 371, and two years under former 18 U. S. C. (1946 ed.) 88. There is no reason to believe that Congress had any other purpose in mind". But the general conspiracy statute does not punish the same type of conspiracy as that covered by this statute. The general conspiracy statute requires the commission of an overt act, that a conspirator do any act "to effect the object of the conspiracy". The Anti-Racketeering Act conspiracy does not require an overt act to complete the offense. **Ladner v. United States,** 5 Cir., 168 F. 2d 771, 773, cert. den., 335 U. S. 827. Rather it, as does the Sherman Anti-Trust Act, proscribes against conspiracies "on the common-law footing". **Nash v. United States,** 299 U. S. 373, 376-378. See also **Singer v. United States,** 323 U. S. 338, 340. The omission of this overt act requirement would in itself be an additional reason for concluding that cumulative punishment was not intended. This Court should not lightly assume in the absence of legislative evidence that Congress meant to impose a twenty year penalty for a conspiracy which did not manifest itself by an overt act and intended an additional penalty of twenty years for the consummation of that agreement. Especially is this so when the only committee report which sheds light on this issue indicates that the substantive provisions were included to avoid the limitations of the Sherman Act and to cover all restraints of commerce, whether in the form of conspiracies or not. S. Rep. No. 532, 73d Cong., 2d Sess.

The Government also contends that the doctrine that Congress has the power to punish separately a conspiracy and a substantive offense was unquestioned when the Anti-Racketeering Law of 1934 and the Hobbs Act of 1946 were passed. This Court did not think that issue was settled in 1946 when it considered **Pinkerton v. United States,** 328 U. S. 640. While the Hobbs Act was enacted into law less than thirty days after the Pinkerton decision and before the motion for rehearing was denied, yet the Government

points to nothing to indicate that it was brought to the attention of Congress. This issue was also not considered when this statute was included in the revision of Title 18 in 1948.

Inherent in the Government's position is that Congress by the organization of the statute in the 1934 and 1946 Acts intended that a violation of each section of the statute could be separately punished. That view leads to the conclusion that if all sections were violated by a single course of conduct, the wrongdoer would be subject to eighty years of imprisonment. This Congress "has not done so in words in the provisions defining the crime and fixing its punishment". **Bell v. United States,** 349 U. S. 81, 83. Its argument ignores the overlap of the various subsections in both the 1934 and 1946 Acts. For example, it treats as one conspiracy and concert of action. It overlooks the fact that concerted action may exist without a conspiracy because its constituents, aiding, abetting, counseling "are not terms which presuppose the existence of an agreement". **Pereira v. United States,** 347 U. S. 1, 11.

The fact that a combination of persons to commit a crime might outweigh in injury to the public the mere commission of the contemplated crime in itself may be an indication of Congressional intent that the combination itself and the completed crime are subject to the same maximum penalty, leaving to the discretion of the trial court the determination of the extent of the public injury in imposing a penalty within the twenty year maximum.

We believe that this case is within the policy of **Prince v. United States,** 352 U. S. 322, 329, "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history".

CONCLUSION.

For the reasons set out above and for those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 33-40) is reported at 274 F. 2d 601. The opinion of the District Court (R. 21-31) is reported at 173 F. Supp. 98.

JURISDICTION.

The judgment of the Court of Appeals was entered on February 2, 1960 (R. 41). The petition for a writ of certiorari was filed on March 1, 1960, and granted on April 4, 1960 (R. 42). 362 U. S. 939. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether Congress intended that a person be subject to cumulative penalties for a single interference of interstate commerce by extortion and for conspiracy so to do, under the Hobbs Act, 18 U. S. C. 1951.

(2) Whether the doctrine of res judicata bars a criminal defendant from collaterally attacking a sentence of imprisonment in excess of that authorized by law if on his direct appeal from his conviction he fails to urge a question as to the legality of his sentence.

STATUTE AND RULE INVOLVED.

62 Stat. 793, 18 U. S. C., § 1951, provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the

presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

• • • • • • •

Rule 35 of the Federal Rules of Criminal Procedure provides:

The court may correct an illegal sentence at any time • • •

STATEMENT.

In a two count indictment returned on March 3, 1954, in the United States District Court for the Eastern District of Missouri petitioner was charged with violating 18 U. S. C. 1951 as follows: Count 1 charged that, from March 1, 1951 until the date of the indictment, petitioner and four others did conspire to obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden, individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear. Count 2 charged that, on the same dates, petitioners and the four others did obstruct, delay and affect interstate commerce by extortion by obtaining $28,016.18 from O. R. Burden individually and as agent of the Burden Construction Company, induced by the wrongful use of actual and threatened force, violence and fear (R. 1-9).

In a trial before a jury, the evidence upon behalf of the government was as follows: Defendants were labor union representatives; Petitioner for the pipefitters and the other defendants for the operating engineers, teamsters and laborers. On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by the defendants, encountered numerous difficulties. The welders were working only four hours a day for a full day's pay; more men were put on the job than were necessary and labor costs were higher than for similar work in other comparable regions. In May, 1952, when the Burden Company was getting ready to start upon another project involving the construction of a new pipe line and the taking up of an old pipe line in Missouri and Illinois, a pre-job meeting was held with the defendants as representatives of the craft unions. Mr. Burden testified that, at the request of petitioner, he had lunch with petitioner alone; that at the luncheon, he told petitioner about his difficulties and said that something drastic would have to be done if his company was to com-

plete its project without great loss. He further testified that petitioner had asked him how much money there was on the job and whether there would be one cent a foot on the project, a rate which would total $28,000.00 or $29,000.00 on the whole job; that petitioner told him that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts and that he would talk to the other crafts. Burden told petitioner that no payment would be made until a substantial portion of the work was done and it was agreed that payments to the defendants would be made by false invoices. Burden also testified that, after the project had been started, at a private meeting with petitioner in August, 1952, he complained that defendants were not living up to the agreement, and that petitioner assured him that the work would pick up and that he would talk to the other crafts. The Burden Company paid $28,000.00 on invoices from various companies or individuals. Three defendants, Thompson, Poster and Secor, were shown to have received money from the Washington Equipment & Construction Company which submitted bills to Burden. Another defendant, Bianchi received two checks direct from Burden. There was testimony that a friend of petitioner set up a fictitious company which sent invoices to the Burden Company (R. 19-20). One Sariego testified that petitioner called Balch, an international union organizer, and told him to set up a fictitious company, the Pipe Line Welders Supply Company. Pipe Line Welders Supply Company invoices in the amount of $1606.40 and $1616.24 were sent to the Burden Company. Burden Corporation checks dated October 14 and October 30, 1952, each in the amount of $3,791.04, were sent to a mailing address in payment of these invoices (R. 17-18).

A jury found petitioner guilty on both counts. On July 19, 1954, he was sentenced to imprisonment for twelve years on each count, to run consecutively, but with sen-

tence on the second count suspended and the petitioner placed on probation for five years on that count (R. 10-11). The conviction was affirmed on appeal. 223 F. 2d 171, certiorari denied 350 U. S. 862.

On December 17, 1958, petitioner filed a motion for correction of sentence arguing that Congress did not intend that a person be subject to two penalties for a single obstruction of commerce by extortion and by conspiracy (R. 11-13).[1]

After a hearing (R. 14-20), the district court denied the motion, holding that the two counts charged separate offenses and that the sentence imposed was not illegal. It ruled that there was no illegality in the sentence under Count One and that any attempt to correct the suspended sentence under Count Two was premature since petitioner was not in custody under that sentence (R. 21-33). The Court of Appeals, relying on **Pinkerton v. United States**, 328 U. S. 640 and **United States v. Rabinowich**, 238 U. S. 78, affirmed holding that "when an accused is charged with conspiracy to commit a federal offense on one count and then in a second count is charged with the commission of a substantive offense which is the object of the conspiracy, the Indictment states two offenses, each of which is punishable." The court also held the rule of lenity inapplicable if conspiracy was charged in one count and a substantive act which was the object of the conspiracy in another. It also concluded that the proceeding could not be maintained because the issue was one which could have been, but had not been raised on direct appeal and, therefore was barred under the doctrine of res judicata (R. 33-40).

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[1] While the motion asked that the sentence be corrected under Count 1, the rule of the Eighth Circuit is that a court, if a sentence is excessive, may order the sentence under either count vacated even if relief is asked on one count only. Holbrook v. United States, 8 Cir., 136 F. 2d 649. The District Court considered the issue as to whether the sentence on either count should be corrected and concluded that any correction under Count 2 was premature.

SUMMARY OF ARGUMENT.

I.

Congress did not choose to punish cumulatively a substantive and conspirational violation of the Anti-Racketeering Act even though the commission of a substantive offense and a conspiracy to commit it may be separate crimes for which the legislature may provide aggregate punishment. The twenty year imprisonment provision is the maximum penalty for a single illegal interference with commerce whether the restraint is in form of a conspiracy or not. The wording of the Act and its legislative history demonstrate that consecutive punishment was not intended.

The initial 1934 Anti-Racketeering Act forbade interference with interstate commerce in the manner described by its four loosely drawn subsections. These provisions overlapped and made illegal robbery and extortion equivalents, physical violence or threats thereof in furtherance of a plan or purpose to violate the act and conspiracy or concerted action to violate the act. Since happenstance could determine whether a single interference with commerce might violate more than one provision, it is more reasonable to conclude that the prohibited means were meant to cover all variety of offender rather than to multiple punishment if particular conduct was covered by more than one provision. The 1946 amendement contained a similar overlap and its revision in the Criminal Code in 1948 was not designed to change its substance.

The Act was directed at one evil racketeering and was designed to stamp out rackets and racketeers The language employed merely verbalized a legal definition of racketeering.

The legislative history shows that one punishment was intended for a single interference with commerce. The

initial draft of the Act in 1934 provided for indefinite punishment for any violation, imprisonment of up to 99 years and a fine at least equal to the unlawful gain. It omitted a requirement of combination to avoid the difficulties of proving that the acts of racketeers affecting commerce amounted to a conspiracy. After this bill had passed the Senate, labor representatives secured a redraft which excepted labor activity. The redraft added without explanation provisions prohibiting concerted action, conspiracy, and acts of physical violence in furtherance of a plan. An amendment offered on the floor of the House prior to passage reduced its maximum penalty to 10 years and a $10,000 fine.

The primary reason for the 1946 Act was to eliminate the labor exemption provisos which had been construed by this Court in **United States v. Local 807**, 315 U. S. 521. Immediately following that decision, a series of bills were introduced in Congress designed to eliminate the labor exemption. Following hearings in 1942 before a House Committee, Representative Hobbs, the sponsor, in commenting upon statements concerning the alleged severity of the penalty provided in the bill, noted that its punishment provisions of 20 years and a $10,000 fine were designed to fit the crime up to the full extent of these maximum limits. This bill also proscribed against a criminal interference with interstate commerce during the war in a title that contained no special conspiracy provision. The committee report, by noting that the same punishment was provided for peacetime and wartime obstructions of commerce is another indication that aggregate punishment was not intended. At the next Congress, the 78th, the bill was again introduced. In debates before the House, Mr. Hobbs again asserted that the twenty year imprisonment provision was the maximum. Throughout the House debates there was a Congressional understanding that a single punishment of 20 years was the maximum imprisonment in-

tended. The bill passed the House but the Senate did not act upon it. The same bill was introduced at the 79th Congress. Again in the House debates it was generally understood that the maximum penalty provided by the act was 20 years. After the bill passed the House, the Senate passed it without debate and it became law in 1946.

The bill was amended in 1948 in the revision of the Criminal Code but there was no intent to change its meaning.

II.

At least the Congressional intent as to cumulative punishment is ambiguous and therefore the policy of lenity should be applicable. No judicial doctrine concerning conspiracy and its substantive offense precludes its application. At the time of the enactment of the Anti-Racketeering Act, this Court had concluded, in cases involving the general conspiracy statute, that a conspiracy and its substantive offenses were separate crimes which might be subject to different statutes of limitations, to different penalties and that neither offense merged into the other. In at least one instance, Congress in providing for a heavier penalty for a specific conspiracy than imposed by the general conspiracy statute assumed that consecutive penalties might not be imposed by a conspiracy and its substantive offense. There is thus no generalized judicial doctrine recognized by Congress that a conspiracy and its substantive offense are to be aggregately punished.

Even if Congress intended cumulative punishment for violating the general conspiracy statute and the commission of a substantive crime, its omission of a Hobbs Act conspiracy from that statute was not designed to authorize a greater cumulative punishment. Significantly, the 1948 revision of the Criminal Code omitted various specific conspiracies from the 5 year penalty imposed by the gen-

eral conspiracy statute for the purpose of providing a heavier penalty. The Hobbs Act was not so excluded. This is a further indication that it is a unique statute of limited purpose.

III.

The validity of consecutive sentences on two counts of an indictment may be raised by a motion under Rule 35, F. R. Cr. P., after affirmance of the conviction. The government has so conceded in its statement opposing certiorari and this Court has so held in **Heflin v. United States**, 358 U. S. 415, 418, 422.

ARGUMENT.

I.

The Language And Legislative History Of The Anti-Racketeering Act Indicates That Congress Did Not Intend To Punish Cumulatively The Interference Of Interstate Commerce By Extortion And A Conspiracy So To Interfere With Commerce.

Introduction.

The Court below assumed that since Congress has the power to punish cumulatively the commission of a substantive offense and a conspiracy to commit the substantive offense[2] that Congress therefore intended that such double punishment may be imposed. In reaching this conclusion the Court misinterpreted the essence of the lenity cases. In all those cases, after it was conceded or decided that Congress had the power to provide for cumulative punishment for offenses arising out of a single factual situation, the question resolved itself as to whether Congress intended that consecutive punishment might be imposed. While the lenity cases involved substantive crimes, the same problem of Congressional intent is applicable whether a single statute proscribes against concerted or individual conduct. The fact that a commission of a substantive offense and a conspiracy to commit it may be separate and distinct crimes and that Congress if it wishes can provide that each offense be either punished singly or aggregately does not mean that Congress when it enacted the instant statute intended that a defendant be punished doubly for both a substantive offense and a conspiracy.

We do not here have a case where the conspiracy arises under the general conspiracy statute, 18 U. S. C. 371, and

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[2] Pinkerton v. United States, 328 U. S. 640.

the substantive offense under a separate statute enacted at a different time. Rather, we have a situation where Congress chose to enact a single statute to cover all forms of unlawful interference with commerce. The single statute here involved is the Hobbs Act, 18 U. S. C. § 1951, which makes it a crime to unlawfully interfere with interstate commerce. It is petitioner's position that there can be but a single punishment for a single interference with commerce, whether the acts affecting interstate commerce amount to a conspiracy in restraint of such commerce or not. This is so because Congress did not intend to punish aggregately the obstruction of commerce by extortion and the conspiracy to so obstruct commerce. While the bill was aimed at criminal gangs and was designed to curb rackets and racketeering, the substantive provisions omitted a requirement of combination to avoid the difficulties of proving that the acts of organized groups amounted to a conspiracy to interfere with commerce.

An examination of this statute significantly known as the Anti-Racketeering Act in the light of its legislative history suggests the application of the rule of lenity. Originally it was enacted in 1934.[3] It was amended in 1946 by the Hobbs Act.[4] It was modified again in 1948 when the entire criminal code, Title 18, was enacted into positive law.[5] The legislative history as to punishment could be more complete. But there is nothing to suggest that Congress intended by this single statute multiple punishment for the obstruction of commerce by extortion and for conspiracy so to do.

1. **The 1934 Act.** The Copeland Act (Appendix p. 5) provided in Section 2 that any person who in connection with any act affecting commerce "(a) obtains or attempts

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[3] Act of June 18, 1934, C. 569, §§ 1-6, 48 Stat. 979.

[4] Act of July 3, 1946, c. 537, 60 Stat. 420.

[5] Act of June 25, 1948, c. 645, 62 Stat. 793.

to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money . . .''; or "(b) obtains the property of another, with his consent induced by wrongful use of force or fear . . .''; or "(c) commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate section (a) or (b)''; or "(d) conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both''.

There was an overlap in each of the subsections. Obtaining property by wrongful use of fear covered by subsection (b) embraces obtaining money by coercion covered by subsection (a). A person who threatens to commit an act of physical injury in furtherance of a purpose under subsection (c) is attempting by the use of force to obtain money under subsection (a). A plan under subsection (c) overlaps the conspiracy under subsection (d). Indeed it may be that in order to violate the conspiracy section, it was necessary that a person commit or threaten to commit an act of physical violence in furtherance of the conspiracy.[6] A person who acts concertedly under subsection (d) would also violate the other subsections.

The loose nature and overlap in the statute was noted by Judge Learned Hand in his opinion in **United States v. Local 807**, 2 Cir., 118 F. 2d 684, 686:

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[6] As pointed out below subsections (c) and (d) were added at the same time. This may indicate that a conspiracy under this statute requires an overt act. But if the statute punishes conspiracy "on the common law footing" as suggested in *Ladner v. United States*, 5 Cir., 168 F. 2d 771, 773, cert. den., 335 U. S. 827, this in itself is an additional reason for concluding that cumulatively punishment was not intended. It is likely that Congress in the absence of legislative evidence intended that a conspiracy which did not manifest itself by an overt act would be punished the same way as an attempt in the event the crime was completed.

". . . . The whole statute is very loosely drawn and we are not sure what subdivision (b) does add to subdivision (a), beyond making it an offense to extort 'property • • • under color of official right'. 'Property' in subdivision (b) presumably includes 'money' in subdivision (a) and, the phrase, 'consent induced by wrongful use of force or fear' in subdivision (b) must include a 'threat to use force', in subdivision (a); if so the two subdivisions to some extent appear to overlap. However that may be, we cannot suppose that the exaction of wages by a 'bona fide employee' is forbidden by subdivision (b) after being expressly excepted from subdivision (a). We can attach no meaning to the third and fourth counts."

The exception contained in subsection (a) "not including, however, the payment of wages by a bona fide employee" was not limited merely to subsection (a) but was held to be applicable to each of the subsections by this Court in **United States v. Local 807**, 315 U. S. 521. "Attempt" was made a crime only in subsection (a). Yet, as was the labor exception, it was obviously designed to apply to the entire act.

The organization of the statute into four subsections of proscribed conduct does not mean Congress intended that a transaction which violated more than one subsection was aggregately punishable. Rather, in reading the loose overlapping statutory language, it seems more reasonable to conclude that Congress by enacting these subsections meant to cover all types and variety of offender rather than to multiply punishment if a particular violator happened to violate more than a single subsection and intended, by the wording of the statute, a single punishment for conspiracy and for a violation of this act involving a single interference. Certainly Congress did not wish to punish consecutively conduct which is forbidden by more than one subsection due to the statutory

overlap. Any person who obtained money by force would not have been subject to two penalties because his conduct was forbidden by both subsections (a) and (b). Nor would any person who acted concertedly with another and violated those sections be punished twice. It is also unlikely that Congress by this language intended multiple punishment for persons who threatened to commit an act of physical violence "in furtherance of a plan or purpose to violate sections (a) or (b)", even though their conduct may have violated each subsection. It is further not reasonable to assume that if the plan was a conspiracy, an additional penalty was authorized. And if one of the charges was "attempt", consecutive punishment with a completed crime was not desired. Reading the language as not authorizing cumulative punishment would thus accord with a commonsensical view of the statute and would avoid inequities in punishment caused by a literal interpretation. Congress apparently intended to establish a single code to deal with racketeering activities of concern to the nation whether conspiratorial, concerted or otherwise.

Its history supports this conclusion. From the outset it is clear that the anti-racketeering act was primarily directed against gangs and organized crime. Its purpose was "to render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." **United States v. Local 807**, 315 U. S. 521, 530. The gangs were designed as racketeers and the crimes that they committed as racketeering. The evil sought to be corrected was the interference with interstate commerce by the criminal activities of these unlawful groups.

On June 12, 1933, the Senate adopted a resolution (S. Res. 74) directing the Committee on Commerce to investigate racketeering.[7] Hearings were held, during which

[7] The resolution specifically mentioned that newspapers were carrying "accounts of 'beer rackets', 'poultry rackets', 'milk rackets',

the term racketeering was generally defined as extortion practiced by organized groups. For example, Joseph Keenan, Assistant Attorney General of the United States defined racketeering as follows: "It is the organized use of threats, coercion, intimidation and use of violence to compel the payment for actual or alleged services of arbitrary or excessive charges under the guise of membership dues, protection fees, royalties, or service rates, the cloak of blackmail and extortion." Professor Franklin E. Russell had this view: "Racketeering is an organized conspiracy to commit the crimes of extortion or coercion, or attempts to commit extortion or coercion, within the definition of these crimes found in the penal law of the State of New York and other jurisdictions. Racketeering, from the standpoint of extortion, is the obtaining of money or property from another, with his consent, induced by the wrongful use of force or fear. The fear which constitutes the legally necessary element in extortion is induced by oral or written threats to do an unlawful injury to the property of the threatened person by means of explosives, fire, or otherwise; and to kill, kidnap or injure him or a relative of his or some member of his family. Racketeering, from the standpoint of coercion, usually take the form of compelling, by use of similar threats to person or property, a person to do or abstain from doing an act which such other person has the legal right to do or abstain from doing, such as joining a so-called 'protective association to protect his right to conduct a business or trade.' Coercion as such does not necessarily involve the payment of money, but frequently both extortion and coercion are involved in racketeering."[8]

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other 'food rackets', 'laundry rackets', 'drug rackets', and other similar schemes for the exploitation, deception and terrorizing of our citizens" 77 Cong. Rec. 4741, 5716-5717.

[8] Hearings before Senate Subcommittee pursuant to Senate Resolution 74, 73d Cong., 2d Sess. (1933), pp. 4 and 8.

Following the hearings, on January 11, 1934, Senator Copeland, as chairman of the subcommittee of the Committee on Commerce, popularly known as the Committee on Racketeering, introduced for the committee some thirteen bills for consideration by the Congress, including S. 2248 the first draft of the Anti-Racketeering Act entitled a bill "to protect trade and commerce against interference by violence, threats, coercion, or intimidation."

As introduced, S. 2248 provided that any person who committed any of the proscribed acts "shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ninety-nine years and, in addition, by a fine which shall be at least commensurate with the amount of the unlawful gain." It extended federal jurisdiction to permit prosecution of racketeers for acts constituting racketeering by embodying very general prohibitions against violence, extortion and coercion, including a provision making it an offense for any person who "coerces or attempts to coerce any person, firm, association or corporation to join or not to join an association, firm, corporation or group, or to buy or rent commodities or services from particular sources, persons, firms, or corporations or to make payments directly or indirectly to any person, association, firm, corporation or group except for a bona fide consideration." It contained no conspiracy section and no specific mention of wages or labor (Appendix, pp. 1-3).

During its introduction, the Senate's attention was directed to a memorandum written by Walter L. Rice, Special Assistant to the Attorney General setting forth the purpose of the bill:[9]

> "The accompanying draft of the proposed Federal Anti-Racketeering Statute is designed to extend fed-

[9] 78 Cong. Rec. 448 (1934).

eral jurisdiction sufficiently to permit prosecution of so-called 'racketeers' for acts constituting racketeering.

In the past such persons have been prosecuted in the Federal courts for incidental violations of law, such as mail frauds or income-tax evasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Anti-Trust Act. This Act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the act by interpretation of the courts, the Act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion. Furthermore, the Sherman Act requires proof of a conspiracy, combination or monopoly, and it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce, or a monopoly. Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce.

The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretations of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal government's constitutional powers. Such restraints if accompanied by extortion, violence, coercion, or intimidations are made felonies, whether the restraints are in form of conspiracies or not. The proposed statute also makes it a felony to do any act 'affecting' or 'burdening' such trade or commerce if accompanied by extortion, violence, coercion or intimidation.

The provisions of the proposed statute are limited so as not to include the usual activities of capitalistic

combinations, bona fide labor unions, and ordinary business practices which are not accompanied by manifestations of racketeering.

Offenses of the character designed to be prohibited are of such a serious nature that it is believed proper to make them felonies, punishable by imprisonment for not less than 1 year and for as long as the court in its discretion shall determine, and in addition by a fine at least commensurate with the amount of the unlawful gain. In one racketeering case prosecuted under criminal provisions of the Sherman Act the unlawful gain was estimated to exceed $10,000,000 per year, but the fine was limited by the act to $5,000 for each person convicted. Under such circumstances it might be said that crime does pay. The penalty here suggested would cancel the benefits derived from the unlawful venture."

The Senate Committee report set forth this memorandum and nothing else.[10] This memorandum was also read by Mr. Stephens of the committee during the brief discussion prior to the passage of the bill in the Senate.[11]

It may be concluded that this Act was initially drafted to extend federal jurisdiction sufficiently to prosecute racketeers, that it covered all interferences with commerce if accompanied by extortion, violence, coercion or intimidation "whether the restraints are in form of conspiracies or not", that it was designed to cover situations where it was difficult to prove conspiracy or combination and that indefinite punishment was provided for any violation. Under such circumstances, it is not likely that Congress intended to punish a single interference doubly if a single transaction or course of conduct violated more than one section.

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[10] S. Rep. No. 532, 73d Cong. 2d Sess.

[11] 78 Cong. Rec. 5734-5735.

After the bill had passed the Senate, labor representatives expressed fear that the bill in its then form might result in serious injury to the labor movement,[12] and the measure was redrafted by officials of the Department of Justice after conferences with labor officials. In the course of this revision, the bill assumed substantially the form in which it was eventually enacted. In particular the provisions "conspires or acts concertedly with any other person or persons to commit any of the foregoing acts" and "commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate Sections (b) or (c) herein" were added. The bill retained the one to ninety-nine year imprisonment and the indefinite fine provision "at least commensurate with the unlawful gain". On behalf of labor, the new bill excepted "the payment of wages to a bona fide employee and contained a proviso preserving "the rights of bona fide labor organizations (Appendix pp. 3-4).

In the favorable report on the revised bill, H. R. Rep. No. 1833, 73d Cong. 2d Sess., the House Committee on the Judiciary set forth without comment a letter from the Attorney General to the committee, dated May 18, 1934. After informing the committee that the draft of the substitute bill was approved by labor, the letter continued:

> "We believe that the bill in this form will accomplish the purposes of such legislation and at the same time meet the objections made to the original bill.
>
> The original bill was susceptible to the objection that it might include within its prohibition the legitimate and bona fide activities of employers and employees. As the purpose of the legislation is not to interfere with such legitimate activities but rather to set up severe penalties for racketeering by violence,

[12] 78 Cong. Rec. 5859.

extortion, or coercion, which affects interstate commerce, seems advisable to definitely exclude such legitimate activities. As the typical activities affecting interstate commerce are those in connection with price-fixing and economic extortion directed by professional gangsters, we have inserted subparagraphs (a) and (b), making such activities unlawful when accompanied by violence and affecting interstate commerce.

The Sherman Anti-Trust Act is too restricted in its terms and the penalties thereunder are too moderate to make that Act an effective weapon in prosecuting racketeers. The Anti-Racketeering Bill would extend the federal jurisdiction in those cases where racketeering acts are related to interstate commerce and are therefore of concern to the nation as a whole.

We have added a new provision prohibiting conspiracy as well as the substantive acts and we have also added a separability clause to make certain the entire act will not be declared unconstitutional in the event that its application to any circumstance is held invalid.

We feel that this bill is a vital part of any federal program to suppress so-called 'racketeering' activities which have assumed nationwide proportions."

When the revised bill was brought before the House, the debate was limited to less than a column of the Congressional Record and consisted of one member's demanding and receiving assurance that an exemption for labor was applicable and was satisfactory to organized labor.[13] Representative Oliver offered an amendment to the committee amendment which was adopted without discussion. In lieu of punishment provisions "from 1 to 99 years, and in addition, by a fine which shall be at least commensurate

[13] 78 Cong. Rec. 10867, 11402-11403.

with the amount of the unlawful gain", it substituted "10 years or by a fine of $10,000 or both."[14] After it was passed in the House, the Senate concurred in the bill without debate and without division.[15] While the bill awaited the signature of the President, Senator Copeland submitted a report in which he referred to § 2248 as one of 11 bills which had been enacted as a result of the activities under Senate Resolution 74 of the subcommittee of the Committee of Commerce, popularly known as the "committee on racketeering" and it related activities under Senate Resolution 196 making it a "committee on crime and criminal practices."[16]

The principal reason for the bill substituted by the House was to eliminate any prohibition upon the legitimate activities of labor unions. The addition of the provision prohibiting conspiracy was without explanation. This change does not warrant an inference that it was for the purpose of providing for cumulative punishment for the commission of a conspiracy and the substantive crime. Indeed at the time of the modification, the punishment provisions of 99 years imprisonment and a fine at least commensurate with the amount of the unlawful gain remained. Such indefinite punishment compels the conclusion that only a single punishment was sought. Coupled with this is the fact that the statute is directed against one specific evil, racketeering related to interstate commerce, whether in the form of a combination or otherwise. Since the same evil is the basis of both a prosecution for conspiracy and for a substantive crime under the act, it is more reasonable to conclude that only alternative penalties were intended. Indeed since there would have been

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[14] His amendment also deleted paragraph (a) of Section 2 of the revised bill.

[15] 78 Cong. Rec. 11482.

[16] S. Rep. No. 1440, 73d Cong., 2d Sess.

only a single unlawful gain in a conspiracy that terminated in a completed crime, the minimum fine provision, an amount equal to the unlawful gain, also argued against double punishment.

The House Committee's version of the bill recognized that individuals had been coerced to join groups and had been forced to pay tribute to groups. This in itself was an indication that Congress did not mean to punish group action more severely than individual action but meant to leave the punishment to the discretion of the Court.

The penalty provision was reduced by amendment in the House to a maximum imprisonment of ten years and a maximum fine of $10,000. Again we have a change without explanation. But it does not warrant an inference that consecutive penalties were now authorized.

2. **The 1946 Act** (Appendix p. 23). Section 1 of the 1946 Act defined commerce, robbery and extortion. The definition of robbery and of extortion were similar to that of Section 2 (a) and 2 (b) respectively of the 1934 Act. Again robbery and extortion overlapped. Section 2 made it a crime to obstruct commerce by robbery or extortion. Sections 3, 4 and 5 made it a crime "to do anything in violation of Section 2". Section 3 covered anyone who "conspires with another or with others, or acts in concert with another or with others", Section 4 included "whoever attempts or participates in an attempt" and Section 5 embraced any person who "commits or threatens physical violence to any person or property in furtherance of a plan or purpose". Again there are the other overlaps. A "plan" under Section 5 overlapped the conspiracy described in Section 3. Concerted action in Section 3 also would violate either or all of the other parts of the act relating to robbery, extortion, conspiracy and threats in furtherance of a plan. Section 6 provided: "Whoever violates any section of this title shall, upon conviction

thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both." This punishment clause was equivocal as to whether cumulative or alternative punishment was intended.

The most significant change was the elimination of the labor exemption. The prime purpose of the 1946 amendment was designed to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship.[17] It was passed after this court had construed the 1934 Act in **United States v. Local 807, 315 U. S. 521.** In that case the union and some of its members were convicted of conspiracy to violate the Anti-Racketeering Act. They had conspired to use and did use violence and threats to obtain money (amounting to the regular union rates for a day's work of driving and unloading) from the owners of trucks passing from New Jersey to New York. In some instances they assisted or offered to assist in unloading the truck and in others they offered no services after the money was paid. This court reversed the conviction holding that, under the proviso excepting from punishment any person who obtains or attempts to obtain by force or the threat of force the payment of wages by a bona fide employer to a bona fide employee, defendants were not guilty if their objective was to become bona fide employees and to obtain wages in that capacity, even though they may fail of their purpose.

This Court decided the Local 807 case on March 2, 1942. Within a week after the decision of this Court two bills were introduced in Congress looking towards an amendment to the Anti-Racketeering Act of 1934.[18] Shortly thereafter, Representative Hobbs introduced H. R. 6872

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[17] United States v. Green, 350 U. S. 415, 418-419.

[18] H. R. 6753, 77 Cong. 2d Sess. and S. 2347, 77 Cong. 2d Sess. were not reported out of committee They each would have simply deleted the labor exception.

(Appendix pp. 7-8) and H. R. 7067 (Appendix pp. 8-11). Both bills provided for a twenty year penalty.[19] The latter bill was introduced on May 11, 1942[20] after hearings were held before a subcommittee of the House Committee on the Judiciary.[21] H. R. 7067 proscribed against acts identical with the bill, H. R. 32, 79th Cong. 1st Sess., which finally passed in 1946 except for two particulars. The bill contained a title which forbade interference with troops and supplies in commerce during wartime and the proviso that it shall not affect four laws in the labor relations field was only applicable to this title. The hearings were largely addressed to alleged evils committed by labor unions, particularly the Teamsters' Union.

At the conclusion of the 1942 hearings before the House Committee, Mr. Hobbs, the sponsor of the bills, made the following statement in regard to the bill then under consideration (pp. 426-427):

> Mr. Hobbs: Now, then, I want to be heard just a minute on H. R. 6872 as a witness. The first statement I would like to make with regard to the bill is to call your attention to the title, "to protect trade and commerce against interference by violence, threats, coercion, or intimidation."
>
> That answers the contention made by several witnesses as to the language of the bill. In aid of their

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[19] H. R. 6872, 77 Cong. 2d Sess. was substantially like the 1934 act except that it eliminated the labor exception. It also forbade in addition to money or other valuable consideration "protection or protective service, or the expressed or implied promise thereof; or the purchase or rental of property."

[20] 88 Cong. Rec. 4080.

[21] Hearing before subcommittee of the Committee of the Judiciary, House of Representatives, 77th Cong., 2d Sess. on H. R. 5218, H. R. 6752, H. R. 6872 and H. R. 7067. H. R. 5218 was a bill to confer jurisdiction on the United States in cases involving work stoppages and for other purposes. H. R. 6752 was a bill to confer jurisdiction in the United States courts in cases involving work stoppages for illegitimate and non-labor purposes.

contention they say that this proposed Federal law is not necessary because the State statutes already cover the ground. The State statutes seek to punish in the regular way those persons who are found guilty, after the machinery of the courts has ground, of those crimes which are denounced by State law. The purpose of this law is entirely different. It is to protect interstate commerce from criminal interference. Here, the prime purpose is not to punish a criminal for his crime against State law, but rather to punish interference with interstate commerce by robbery or extortion. This bill would invoke the aid of the Federal authorities to prevent the commission of those crimes and to protect interstate commerce.

In the second place, I wish to call your attention to the fact that the elements of the crime denounced by this bill are essentially the same as the elements of robbery or extortion. The only added element is interference with interstate commerce. In order to amplify and clarify, I am seriously considering a revision of H. R. 6872 so that it will denounce interference with interstate commerce by robbery or extortion in haec verba. Of course, the revised bill should include conspiracy and attempts to commit such a crime, but the essence would be interference with interstate commerce by robbery or extortion.

In the revised bill, I shall probably include as a separate title, the life of which would be limited to the duration of the war, the amendment suggested by Hon. Joseph B. Eastman in our hearings this morning.

Criticism has been made of the alleged severity of the punishment described in H. R. 6872. Such criticism loses its point, however, when it is considered that in several States of the Union the punishment for robbery is fixed at death and that the 20-year maximum sentence authorized by my bill is about the

average. The crime of extortion also is punishable by some such length of imprisonment. So I do not think it can be fairly said that the punishment prescribed by my bill, a fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both, is too severe. Under it, one found guilty could be sentenced to pay a fine of 1 cent, without imprisonment, but in the sound discretion of the court the punishment could be made to fit the crime up to the full extent of the maximum limits.

Therefore, in the light of the testimony and admissions contained in the record of the hearings we have been holding, I feel sure that we can agree that those persons who have been impeding interstate commerce and levying tribute from free-born American citizens engaged in interstate commerce shall not be permitted to ply their racket without a sincere attempt on the part of Congress to do its duty of protecting interstate commerce.

H. R. 7067 was reported by the committee after making amendments reducing its maximum penalty to ten years.[22] The report, H. R. Rep. No. 2176, 77 Cong., 2d Sess., stated:

> The purposes of these bills are (1) to prevent interference with interstate commerce by robbery or extortion, as defined in the bill, and (2) to prevent interference during the war with the transportation of troops, munitions, war supplies, or mail in interstate or foreign commerce. . . .
>
> Title I.
>
> This title is an amendment of the existing anti-racketeering law which was enacted in 1934. It was

[22] The committee amendment also struck out "or the preparation of any article or commodity for commerce."

passed in an effort to eliminate racketeering in relation to interstate commerce, and of concern to the nation as a whole. That statute came under examination of the Supreme Court recently in United States v. Local 807 and the opinion in that case is set out in full, both the majority opinion and the dissent:

* * * * * * * *

(Local 807 opinion contained in report is omitted.)

* * * * * * * *

The objective of Title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill. A conspiracy or attempt to do anything in violation of Section 2 is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate Section 2.

A penalty is prescribed of imprisonment for not more than 10 years or a fine of not more than $10,000, or both, upon conviction of violating any section.

Title II.

This Title was suggested by the director of the office of Defense Transportation, Hon. Joseph B. Eastman. The provisions of this Title were embodied in a world war statute (40 Stat. 274; par. 23 of Sec. 1 of the Interstate Commerce Act), which was effective during that war. The statute applied to shipments by railroads and the provisions contained in Title II of the present bill have been expanded to apply also to other forms of transportation. Instances were cited in the hearings showing the necessity for and desirability of this title of the bill. The prior statute is shown as an exhibit at the conclusion of this report

for purposes of comparison. The same punishment prescribed for violating any section of Title I is prescribed for violating Title II.

* * * * * * * *

The report also contained the following statement:

> In the light of the testimony and admissions contained in the hearings and of the above quoted provisions of the Constitution, there must be agreement that those persons who have been impeding interstate commerce and levying tribute from free-born American citizens engaged in interstate commerce shall not be permitted to continue such practices without a sincere attempt on the part of Congress to do its duty in protecting interstate commerce.
>
> "This bill would outlaw two kinds of criminal interference with interstate commerce in war or peace and any kind of interference with the movement of troops or war material and interstate commerce during war. The committee on the judiciary respectfully commends this bill, with the committee amendments, to the favorable consideration of the House."

A minority report was also filed with the bill. There was no further action on the bill in that Congress.

It is to be noted that the report states that the "same punishment prescribed for violating any section of Title I is prescribed for violating Title II". Title II covered criminal interference with commerce in war but contained no conspiracy provision. It would be incongruous to say that Congress intended that a peacetime conspiratorial and substantive interference with commerce was to be subject to a greater penalty than a war time interference. Yet that would have been the result if consecutive penalties were applicable.

At the beginning of the 78th Congress on January 6, 1943, Representative Hobbs introduced H. R. 653, a bill

identical with the original draft of H. R. 7067 with a 20 year imprisonment provision.[23] On January 28, 1943, the bill was reported by the House Committee. The committee report, H. R. Rep. No. 66, 78 Cong., 1st Sess., noted that the bill was a successor bill to H. R. 6872 and H. R. 7067 of the Seventy-seventh Congress. The report was substantially identical to H. R. Rep. No. 2176 of the prior Congress and substituted the 20 years imprisonment in place of 10 years imprisonment in the prior report.[24] The minority report, signed by Representatives Celler and Lane, after noting that the intent of the bill was "to impose severe criminal restrictions upon the activities of labor unions stated in part:

> However, even if these were normal peace times there has, in our opinion, been a complete failure of any showing requiring so drastic a Federal police measure affecting all labor unions throughout the country. Please note penalties of not more than 20 years imprisonment are prescribed. In this period of grave national emergency the bill is not only unnecessary to meet any alleged evil; it would, if passed, make serious inroads in our constructive labor policy with a consequent interference with full war production. In brief, the bill is at best dangerously ill-timed.

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[23] 89 Cong. Rec. 23.

[24] Again as in H. R. 7067, the committee amendment struck out "or the preparation of any article or commodity for commerce" from the definition of commerce.

A supplemental report of the committee was submitted by Mr. Summers of Texas relative to the proviso that nothing shall be construed to repeal, modify, or affect certain designated sections of the Clayton Act, Norris-La Guardia Act, the Railway Labor Act or the National Labor Relations Act. It was decided that this should be made applicable to Title I as well as Title II and the proviso was then set forth as Title III. H. R. Report No. 66, Part 2, 78th Cong., 1st Sess.

The 1943 bill was passed by the House after debate[25] but the Senate took no action on the bill. In the House debate on the bill Congressman Hobbs, the sponsor, in answering objections to the punishment in the bill, stated (89 Cong. Rec. 3218):

> "Another opposition argument frequently employed is that the punishment prescribed in this bill is too severe. The answer is that the crimes of robbery and extortion are not trivial. They are major felonies, heinous offenses. Only when the interference with interstate commerce, condemned by this bill, is accomplished by means so criminal as to be within the definitions of robbery and extortion is any punishment stipulated. But the argument that the punishment prescribed is too severe ignores the fact that it is only the maximum. Any punishment less than this maximum may be imposed by the Court. A fine of 1 cent or a sentence of 1 minute in jail is just as much a punishment under the provisions of this bill as is the maximum. This bill simply enables the Court that heard the evidence and knows the details of each case to make the punishment fit the crime. It is interesting to note, however, that a number of states have fixed the maximum punishment for robbery at death. The maximum fixed in this bill is about the average. Take New York, for instance. The definition of robbery contained in this bill is substantially copied from the New York statute. Yet New York has fixed the minimum punishment for first-degree robbery at 10 years and the maximum punishment at 30 years. This bill contains no minimum punishment and fixed the maximum mid-way between the two New York limits."[26]

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[25] 89 Cong. Rec. 3161-3164, 3192-3230.

[26] Until 1950 the general conspiracy statute in New York which included a conspiracy to extort was only a misdemeanor. N. Y. Penal Law, § 580.

Later, in arguing against an amendment which would have reduced the maximum penalty from 20 years to 10 years, Mr. Hobbs urged (89 Cong. Rec. 3229):

> Mr. Chairman, the punishment fixed in this bill is a maximum, and any punishment imposed by a judge of 1 cent or 1 hour in jail would be covered by this maximum penalty just the same. May I point out to the House again that this bill was copied substantially from the New York statute which punishes first-degree robbery by a minimum punishment of 10 years and a maximum of 30 years. We took the average of 20 as a maximum with no minimum. I think the gentleman is amply protected in his desire for the penalty to be reasonable and all we are doing is giving the Court the right to make the punishment fit the crime.

It is apparent that the sponsor considered 20 years as a reasonable maximum penalty and that he did intend that consecutive penalties be imposed for a conspiracy and a substantive violation. Moreover, throughout the debates, a Congressional understanding that 20 years was the maximum penalty is apparent. Opposition was expressed to the severe penalty of "up to 20 years" imposed by the bill and that this penalty might be imposed on persons engaged in concerted activity (Appendix pp. 12-19). 89 Cong. Rec. 3162, 3194, 3201, 3204, 3207-3208, 3223, 3226, 3229. No one arose to argue that the penalties which might be imposed on those who acted concertedly might be doubled if the jury found the group activity was also a conspiracy.

On January 3, 1945, at the 79th Congress, Mr. Hobbs introduced H. R. 32, the bill which was enacted as the 1946 law.[27] This bill was identical with the amended version of H. R. 653 which the House had passed during the 78th

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[27] 91 Cong. Rec. 10

Congress. Shortly thereafter, Mr. Hobbs, from the Committee of the Judiciary, submitted a report on the bill. H. R. Rep. No. 238, 79th Cong., 1st Sess. This report, also entitled "Amending the Antiracketeering Act", noted that it was a successor bill to H. R. 6872 and H. R. 7067 of the Seventy-Seventh Congress and of H. R. 653 of the Seventy-Eighth Congress, "which was favorably reported by the committee and passed by the House." The report was otherwise identical with the prior House report in the previous Congress with one exception. It contained a short comment upon Title III of the bill stating it was not intended to prevent the doing of acts authorized by the four acts mentioned in that title and that it should not be interpreted "as authorizing any unlawful acts, particularly those amounting to robbery or extortion". There also was no minority report.

Again in the House debates on H. R. 32 it was generally understood that the maximum penalty provided by the act was 20 years. Several Congressmen argued that the bill provided for imprisonment up to 20 years and/or fine of $10,000.[28] 91 Cong. Rec. 11845, 11846, 11901, 11902, 11916, 11917. Reference was that to the hearings held in 1942. 91 Cong. Rec. 11841. The conspiracy conviction in the Local 807 case occupied a good part of the debate. 91 Cong. Rec. 11841. The House debates in their entirety indicated that the bill was primarily directed against labor practices and labor unions. The application of the bill to group action was noted throughout. For example, Mr. Robsion stated "it does not apply to labor unions alone, it applies to any group of men that are interfering with interstate commerce, whether they be labor unions, farm organizations, or anybody else". 91 Cong. Rec. 11843. There was further reference to the 807 case. 91 Cong. Rec. 11844, 11847-11848, 11905, 11907, 11912, 11913,

[28] 91 Cong. Rec. 11839-11847, 11899-11922

11915. It was noted that the definition of robbery and extortion followed the definition contained in the laws of the state of New York. 91 Cong. Rec. 11900. There was reference to the conspiracy and acting concertedly provisions of both the new and old acts. 91 Cong. Rec. 11901-11902. Mr. Celler argued that in certain circumstances, all members of the union may be involved because it might be found that they either conspired or acted in concert with other members of the union. 91 Cong. Rec. 11901-11902. Again the debate showed the prime purpose of the bill was to protect interstate commerce from robbery and extortion. The main issue in the debate was whether or not and to what extent labor unions should be excepted from the operation of the act. In arguing for the bill, Mr. Robsion stated that the definitions of robbery and extortion were those used in New York, 91 Cong. Rec. 11905, and further contended that the crimes of robbery and extortion were not confined to racketeers in the labor movement but that groups of farmers had on occasion been racketeers as well as other groups. 91 Cong. Rec. 11906. The proponents of the bill wished to protect the truck operators and truck drivers who have been beaten up by labor racketeers when driving their truck into the Holland Tunnel as in the Local 807 case. 91 Cong. Rec. 11908-11909. It was further argued that the bill was designed to suppress gangsters. 91 Cong. Rec. 11909-11910. After it was pointed out that this was not the first time the bill had passed, 91 Cong. Rec. 11909-11910, Mr. Hobbs, the sponsor, argued that conditions had deteriorated since 1943 noting that not only the price of the union wages for a day were being charged but in addition an initiation fee into the union was compelled. 91 Cong. Rec. 11912. Since World War II had terminated, Title II, the provision dealing with war-time interference with commerce was stricken. 91 Cong. Rec. 11918-11919. On December 12, 1945, the bill passed the House without division. 91 Cong. Rec. 11922.

On June 18, 1946, Mr. Hatch from the committee on the judiciary submitted this bill, H. R. 32, to the Senate with its report, S. Rep. No. 1516, 79 Cong., 2d Sess. (1946), also entitled "Amending the Antiracketeering Act". It simply stated, after recommending it be passed:[29]

> The purpose of this bill is to prevent interference with interstate commerce by robbery or extortion, as defined in the bill. Title I of this bill is an amendment of the existing law which was enacted in 1934. The objective of the amendments is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion.
>
> A conspiracy or attempt to do anything in violation of section 2, title I, is likewise made punishable, as is the commission or threat of physical violence to any person or property in furtherance of a plan to violate section 2.
>
> A penalty is prescribed of imprisonment for not more than 20 years or a fine of not more than $10,000, upon conviction of violating any section.

On June 21, 1946, it passed the Senate without debate. Mr. Hatch simply stated that this bill was the so-called anti-racketeering or so-called Hobbs bills that was passed by the Senate several days ago as an amendment to the so-called Case bill and that his only purpose was to have the Senate vote upon it. 92 Cong. Rec. 7308.

The 1946 bill was also a bill directed against the specific evil of racketeering. The main purpose of the bill was

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[29] On May 29, 1946, after the Senate tacked on the Anti-racketeering Act to H. R. 4908 entitled "an act to provide additional facilities for the mediation of labor disputes and for other purposes." Congress passed this bill, popularly known as the Case bill, but it was vetoed by the President on June 11, 1946. H. Doc. No. 651, 79th Cong., 2d Sess., 92 Cong. Rec. 6674-6678.

designed to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship. Much of the debate centered upon the effect of the bill upon union activities and upon the upset of the conspiracy conviction in the Local 807 case. Yet when Congressmen argued that the 20 year maximum penalty was too severe, Mr. Hobbs, the sponsor, agreed that this was the maximum. No one suggested that consecutive penalties might be imposed.

It was the Government's position, in opposing certiorari, that Congress by the organization of the statute in the 1934 and 1946 Acts intended that a violation of each section of the statute could be aggregately punished. That view leads to the conclusion that if all sections were violated by a single course of conduct, the wrongdoer would be subject to eighty years of imprisonment. This Congress "has not done so in words in the provisions defining the crime and fixing its punishment". **Bell v. United States**, 349 U. S. 81, 83. Its argument ignores the overlap of the various subsections in both the 1934 and 1946 Acts. For example, it treats as one conspiracy and concert of action. It overlooks the fact that concerted action may exist without a conspiracy because its constituents, aiding, abetting, counseling "are not terms which presuppose the existence of an agreement". **Pereira v. United States**, 347 U. S. 1, 11. Indeed the existence of a general aiding and abetting statute[39] further points to that the fact that Congress was merely trying to make certain every variety of offender was covered by the instant act.

3. **The 1948 Act.** The 1948 Act, which is applicable here, was changed during the revision of the Criminal Code. It substituted the words "attempts or conspires so to do" for the wording of the 1946 Act and omitted as unnecessary the words "participate in an attempt" and the

[39] 18 U. S. C. 1940 ed., § 550, R. S. §§ 5323, 5427.

words "or acts in concert with another or with others." There was no intent to change the meaning of its provisions. See Revisor's Note to 18 U. S. C. 1951.

II.

The Doctrine That Conspiracy and the Substantive Offense May Be Separately Punishable Does Not Preclude the Application of the Rule of Lenity.

At least the congressional intent as to cumulative punishment is ambiguous and therefore the policy of lenity should be applicable. **Bell v. United States**, 349 U. S. 81, 83-84; **Ladner v. United States**, 358 U. S. 169; **Heflin v. United States**, 358 U. S. 415. The doctrine that conspiracy and its substantive offense may be separately punishable does not preclude its application.

At the time of the enactment of the instant statute, there was no generalized judicial doctrine that a conspiracy and its substantive offense were to be aggregately punished. Rather the law was that such offenses were separate crimes. But, regardless of whether Congress intended aggregate punishment for a violation of the general conspiracy statute and for substantive offenses, it did not intend the Anti-Racketeering Act to provide such punishment.

The cases in which this Court has considered the issue of separability of conspiracy and substantive offense have arisen where the conspiracy was one created by the general conspiracy statute, now 18 U. S. C. 371, which from its enactment in 1867 until the revision of the Criminal Code in 1948 carried a maximum penalty of two years. The issue first arose in **United States v. Hirsch**, 1879, 100 U. S. 33. The question was whether counts drawn under the general conspiracy statute charging a conspiracy to violate the revenue laws were subject to the general statute of

limitations or to a special statute of limitations applicable to revenue offenses. The general conspiracy statute had been initially enacted in a revenue statute. This Court, in finding the general statute applicable, held that an offense punishable under the general conspiracy section was not a crime arising under the revenue laws even when the required overt act was one affecting the revenue laws. In **Clune v. United States**, 1895, 159 U. S. 590, defendants were indicted under the general conspiracy statute for a conspiracy to obstruct the mails. The substantive offense of obstructing the mail was merely punishable by a small fine. Defendants argued that the conspiracy could not be punished more severely than the substantive offense, contending that the conspiracy had merged into a completed substantive crime. Rejecting this argument, this Court held that under the general conspiracy statute, a conspiracy to commit an offense is denounced as a separate offense with a punishment fixed therein, that the wisdom of punishing the conspiracy more severely than the act itself was a matter for the legislature, and "the power exists to separate the conspiracy from the act itself and to affix distinct and independent penalties to each." The Court also concluded that upon the record it could not determine whether the conspiracy was merged in the completed act.

Carter v. McClaughry, 1902, 183 U. S. 365, involved an appeal in a habeas corpus proceeding in which the appellant was restrained of his liberty by a sentence imposed by a court-martial. He had been found guilty under charges of (1) conspiracy to defraud, (2) making false claims against the United States and (3) embezzlement. It was contended that his sentence for the first two charges constituted double jeopardy because the article of war under which they arose provided for an imprisonment or a fine and both sentences were imposed. The Court, while finding that the general sentence could be sustained under

the embezzlement count, also held there was no double jeopardy because of the sentence imposed on the first two counts and concluded that the court-martial had the power to punish appellant as to one offense by fine and as to the other by imprisonment. It noted that Congress had authorized both fine and imprisonment for committing one of these offenses and that, in transferring the offense to the military code, the word "and" was changed to "or."

In **United States v. Stevenson,** 1909, 215 U. S. 200, the punishment for the substantive offense was less than for the conspiracy. This court held, following **Clune,** that Congress had the power to affix a greater penalty for the conspiracy. **Heike v. United States,** 1913, 227 U. S. 131, rejected an argument that it was an abuse of discretion to permit a conspiracy conviction when the evidence showed that the substantive crimes had been committed, holding that "the liability for conspiracy is not taken away by its success." Finally, **United States v. Rabinowich,** 1915, 238 U. S. 78, held that a conspiracy to violate the bankruptcy act is not of itself an offense "arising under" the bankruptcy act and is therefore not governed by its short statute of limitations. The Court found that there was nothing unreasonable or inconsistent with the policy of the bankruptcy act to allow a longer limitation period for a conspiracy since it may be a greater evil than the commission of the contemplated crime.

The state of the law in 1934 in regard to offenses under the general conspiracy statute was: (1) a longer statute of limitations might be applied to the conspiracy than to the substantive offense; (2) even if the substantive offense was a misdemeanor or a petty offense, a conspiracy to commit it would subject the violator to a two year penalty; (3) a conspiracy was still punishable even though the intended crime was accomplished and (4) there was no double jeopardy for a military court-martial to impose

punishment of both imprisonment and a fine for conspiracy and the substantive offense under an article of war providing for imprisonment or a fine when Congress had authorized both punishments for a single offense.

There were no significant changes in judicial doctrine prior to the 1946 Hobbs Act. In **Braverman v. United States**, 1942, 317 U. S. 49, a single agreement to commit acts in violation of several penal statutes was held to be punishable at two years imprisonment, the maximum penalty for a single violation of the conspiracy statute rather than as several conspiracies.

Significantly, in 1944, when Congress increased the penalty for conspiracy to violate the counterfeiting laws, it did not recognize any doctrine of aggregate punishment applicable to a conspiracy and its substantive offense. Rather as noted in the Committee report, the need for a heavier conspiracy punishment was caused by the fact that in many cases criminal ringleaders were only subject to the two year conspiracy penalty when it was impossible to prove against them a substantive crime creating the anomolous situation that the minor offenders were subject to a severer sentence. The committee considered the 15 year penalty provided for violating the substantive offense as the maximum for violating the counterfeiting laws. H. R. Rep. No. 1039, 78th Cong., 2d Sess. (Appendix pp. 25-29).

On June 10, 1946, this Court decided **Pinkerton v. United States**, 328 U. S. 640, after the House had passed the Hobbs Act and shortly before the Senate passed that act without debate. But there is nothing to indicate that this case was brought to the attention of the Senate. The contention in that case was that the substantive offenses merged into a single conspiracy charge and that only a single sentence not exceeding the 2 year maximum provided by conspiracy statute might be imposed. This Court

refused to accept this merger argument. On the same day in **American Tobacco Co. v. United States**, 328 U. S. 781, 787-789, punishment for conspiracy to monopolize and conspiracy in restraint of trade in violation of the Sherman Act was considered not to be double jeopardy. Also rejected was an argument that conspiracy to monopolize and monopolization were dependent upon the same proof and were not separately punishable for that reason.[31]

Between 1946 and 1948, this court again merely recognized that a conspiracy under the general statute and its substantive offense are distinct crimes. **United States v. Bayer**, 331 U. S. 532, 541-543; **Sealfon v. United States**, 332 U. S. 575, 578.

The 1948 revision of the criminal code increased the punishment for violating the general conspiracy statute from two to five years. While this section excluded certain specific conspiracies for the purpose of providing a heavier punishment, the Hobbs Act was not so excluded. The Reviser's notes stated in part:

> "A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title, were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense. Special conspiracy provisions were retained in Sections 241, 286, 372, 757, 794, 956, 1201, 2271, 2384 and 2388 of this

[31] The *Pinkerton* case also ended a conflict between circuits by concluding that a conspirator may be found guilty of the substantive crime if that crime is committed in furtherance of the substantive offense even though he does not participate in that offense. The result was that a ringleader could be convicted of the substantive offense in which he did not directly participate and that all parties to a crime were subject to the same penalty.

title. Special conspiracy provisions were added to Sections 2153 and 2154 of this title."

It follows that this court is again dealing "with a unique statute of limited purpose" which should be within the policy of **Prince v. United States**, 352 U. S. 322, 325, 329, "of not attributing to Congress, in the enactment of criminal statutes, or intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."

III.

The Validity of Consecutive Sentences on Two Counts of an Indictment May Be Raised by Motion After Affirmance of the Conviction.

The Court below held: "Appellant's motion whether based upon Rule 35 or Section 2255, supra, cannot serve as an appeal. The questions now sought to be litigated could have been urged by him on appeal from his conviction and hence he cannot collaterally attack the judgment of conviction and sentence by motion" (R. 39-40). But the government has conceded that since the claimed illegality in the sentence appears from the face of the indictment and judgment, the sentence is one which may be corrected on collateral attack. This was established as far back as **Ex parte Large**, 18 Wall. 163, and **In re Snow**, 120 U. S. 274. Rule 35, F. R. Crim. P., itself provides that "the Court may correct an illegal sentence at any time." Recently, in **Heflin v. United States**, 358 U. S. 415, 417-418, this Court held that such a motion to correct lies. The **Heflin** case impliedly finds the doctrine of res judicata inapplicable by concluding that "successive motions may be made under Rule 35." The defendant there had also taken a direct appeal. This Court in other instances has reached and decided issues concerning the legality of the length

of a sentence, although the questions were raised by collateral attack on consecutive sentences. **Prince v. United States**, 352 U. S. 322; **Gore v. United States**, 367 U. S. 386. Although the defendants in those cases had been tried and convicted but did not institute a direct appeal, we see no distinction between a defendant who appeals and one who does not directly appeal his conviction. Both could have litigated any question concerning the length of their sentence on direct appeal. One reason why defendants in both categories may litigate that issue on collateral attack is that such sentence may be corrected "at any time." Furthermore, it would be unjust to imprison any individual beyond the length of time that Congress had designated as the maximum period for a certain type of wrongful conduct.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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No. 47.

IN THE

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LAWRENCE CALLANAN,
Petitioner,

v.

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St. Louis Law Printing Co., Inc., 415 N. Eighth St., CE 1-2211

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Proceedings on the Anti-Racketeering Acts.
Proceedings on the 1934 Act.

The bill was introduced by Senator Copeland in the Senate on January 11, 1934 as S. 2248, 73d Congress, 2d Session, in the following form:

> "That the term 'trade and commerce', as used herein, shall include trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and

any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

Sec. 2. Any person who, in connection with or in relation to any act in any way or to any degree affecting, burdening, hindering, destroying, stifling, or diverting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(1) commits or threatens to commit any act of violence, intimidation, or injury to a person or property, or commits any act which is declared to be unlawful by the criminal laws of the State, district or Territory where the act is committed; or

(2) extorts or attempts to extort money or other valuable considerations; or

(3) coerces or attempts to coerce any person, firm, association, or corporation to join or not to join an association, firm, corporation, or group, or to buy or rent commodities or services from particular sources, persons, firms, or corporations, or to make payments directly or indirectly to any person, association, firm, corporation, or group except for a bona fide consideration; or

(4) coerces or attempts to coerce any person, firm, association, or corporation to do an act which such person, firm, association, or corporation has a legal right not to do or to abstain from doing an act which such person, firm, association, or corporation has a legal right to do—

shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from 1 to 99 years, and, in addition, by a fine which shall be at least commensurate with the amount of the unlawful gain.

Sec. 3. Any person charged with violating this act may be punished in any district in which any part of the offense has been committed by him or his associates or his conspirators."

After S. 2248 passed the Senate, the House Committee in the Judiciary substituted the following bill:

"That the term 'trade or commerce', as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

"Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Commits or threatens or attempts to commit an act of physical violence or physical injury to a person or to the property of another, in furtherance of a plan, purpose, or attempt to fix or increase prices, or restrict or allocate production, purchases, or sales, or suppress competition; or

"(b) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

"(c) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(d) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (b) or (c) herein; or

"(e) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment of from 1 to 99 years, and in addition, by a fine which shall be at least commensurate with the amount of the unlawful gain.

"Sec. 3. (a) As used in this act the term 'wrongful' means in violation of the criminal laws of the United States or of any State or Territory.

"(b) The terms 'property', 'money' or 'valuable considerations' used herein shall not be deemed to include wages paid by a bona-fide employer to a bona-fide employee.

"Sec. 4. Prosecutions under this act shall be commenced only upon the express direction of the Attorney General of the United States.

"Sec. 5. If any provisions of this act or the application thereof to any person or circumstances is held invalid, the remainder of the act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

"Sec. 6. Any person charged with violating this Act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators."

On June 13, 1934, Representative Oliver offered an amendment to the committee amendment which was adopted. It substituted, in lieu of the punishment provi-

sions "from 1 to 99 years, and in addition, by a fine which shall be at least commensurate with the amount of the unlawful gain," the punishment "10 years or by a fine of $10,000 or both." The original paragraph (a) was also stricken. This version of the bill became the Anti-racketeering Act of 1934:

Act of June 18, 1934, 48 Stat. 979.

AN ACT.

To protect trade and commerce against interference by violence, threats, coercion, or intimidation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona fide employer to a bona fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts;

shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from 1 to 10 years or by a fine of $10,000, or both.

Sec. 3. (a) As used in this act the term "wrongful" means in violation of the criminal laws of the United States or of any State or Territory.

(b) The terms "property", "money", or "valuable considerations" used herein shall not be deemed to include wages paid by a bona fide employer to a bona fide employee.

Sec. 4. Prosecutions under this act shall be commenced only upon the express direction of the Attorney General of the United States.

Sec. 5. If any provisions of this act or the application thereof to any person or circumstance is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Sec. 6. Any person charged with violating this act may be prosecuted in any district in which any part of the offense has been committed by him or by his actual associates participating with him in the offense or by his fellow conspirators: Provided, That no court of the United States shall construe or apply any of the provisions of this act in such manner as to impair, diminish, or in any manner affect the rights of bona

fide labor organizations in lawfully carrying out the legitimate objects thereof, as such rights are expressed in existing statutes of the United States.

Proceedings on the 1946 Act.

On March 27, 1942 Mr. Hobbs introduced H. R. 6872, 77th Congress, 2d Session:

A Bill to Amend the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934, known as Public, Numbered 376 of the Seventy-third Congress, be, and it is hereby, amended so that it shall read as follows:

"That the term 'trade or commerce', as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has jurisdiction."

"Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

"(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, money or other valuable consideration; protection or protective service, or the express or im-

plied promise thereof; or the purchase or rental of property; or

"(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

"(c) Commits or threatens physical violence to any person or property in furtherance of a plan or purpose to violate subsections (a) or (b) of this section; or

"(d) Conspires or acts concertedly with any other person or persons to violate any of the provisions of this section; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment of not more than 20 years or by a fine of not more than $10,000, or both.

"Sec. 3. If any provisions of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

"Sec. 4. Any person charged with violating this Act may be prosecuted in any district in which any part of the crime has been committed by him or by his actual associates participating with him in the crime or by his fellow conspirators."

After hearings were held before a subcommittee of the House Committee of the Judiciary, Mr. Hobbs on May 11, 1942 introduced H. R. 7067, 77th Cong., 2d Session. This bill was reported by the Committee which reduced its maximum from twenty to ten years and the bill read as follows:

A Bill to amend the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934 (U. S. C. 1940 edition, title 18, secs. 420a-420e), be, and it is hereby, amended to read as follows:

"Title I.

"Sec. 1. As used in this title—

"(a) The term 'commerce' means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction, and the term 'Territory' means any Territory or possession of the United States.

"(b) The term 'robbery' means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of any one in his company at the time of the taking or obtaining.

"(c) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any

article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

"Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

"Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

"Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

"Sec. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than ten years or by a fine of not more than $10,000, or both.

"Title II.

"Sec. 201. Any person or persons who shall, during the war in which the United States is now engaged, knowingly and willfully, by physical force or intimidation by threats of physical force, obstruct or retard, or aid in obstructing or retarding, or attempt to obstruct or retard, the orderly transportation of persons or property in interstate or foreign commerce, or the transportation of troops, munitions, war supplies, or mail, or the orderly make-up, movement, or disposition of any train, railway or highway vehicle, airplane, or vessel, on any railroad, street highway, airway, or waterway, or elsewhere in the United States which is engaged in transportation in interstate or foreign commerce or in the transportation of troops, munitions, war supplies, or mail, shall be deemed guilty of a felony, and upon conviction thereof

shall be subject to a fine of not more than $10,000 or imprisonment for not more than ten years, or both such fine and imprisonment; and the President of the United States is hereby authorized, whenever in his judgment the public interest requires, to employ the armed forces of the United States to prevent or remove any such obstruction to or retardation of the passage of the mail, or the orderly transportation or movement of interstate or foreign commerce, or the transportation of troops, munitions, or war supplies in any part of the United States whether by air, motor, rail, express, water, or otherwise: Provided, That nothing in this section shall be construed to repeal, modify, or affect either section 6 or section 20 of an Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, or an Act entitled 'An Act to amend the judicial code and to define and limit the jurisdiction of the courts in equity, and for other purposes', approved March 23, 1932, or an Act entitled 'An Act to provide for the prompt disposition of disputes between carriers and their employees, and for other purposes,' approved May 20, 1926, as amended, or an Act entitled 'An Act to diminish the causes of labor disputes burdening or obstructing interstate or foreign commerce, to create a National Labor Relations Board, and for other purposes', approved July 5, 1935. For the purpose of this paragraph, the United States shall be deemed to include all Territories and possessions of the United States."

At the beginning of the 78th Congress on January 6, 1943, Mr. Hobbs introduced H. R. 653, a bill identical with the original draft of H. R. 7067 with a 20-year maximum imprisonment provision. This bill was passed by the House after debate. During the House debates the following statement relative to H. R. 653 were made:

(89 Cong. Rec. 3162.)

"Mr. Delaney: The fact of the matter is that this committee report was not unanimous. Also, in the committee it was indicated by those in favor of this legislation that the legislation is too drastic, that the $10,000 fine and 20 years in jail is too drastic. They think a modified bill might be more in consonance with present-day thinking."

(89 Cong. Rec. 3194.)

"Mr. Fish: * * * I want to refer likewise to some of the excessive penalties. The penalties in this bill in my opinion are too severe—20 years and $10,000 fine. When we reach this section of the bill there should be very careful consideration given to reducing both the extent of the imprisonment and fines."

(89 Cong. Rec. 3201.)

"Mr. Celler: * * *

"Let me call your attention to one or two items in the bill which meet with my disfavor. For example, the bill provides for a punishment of 20 years and/or a fine of $10,000. Examine the antitrust statutes and you will find that malefactors under those statutes do not have to face a 20-year sentence. Violations of the antitrust laws are equally detrimental to the body politic and are as much a crime as extortion or robbery as contemplated by the instant bill. If the extortion or robbery is of such magnitude that it ought to be prosecuted as a felony instead of a misdemeanor, then the prosecution should be under State law. Insofar as the instant bill is concerned, it does not intend to punish extortion or robbery as such, since that would be a usurpation of State's functions. It intends to punish activities which interfere with interstate commerce.

In that respect it parallels the antitrust laws, punishment for violations of which are likewise based on interference with interstate commerce. But in the one case, where capital is involved you have the penalty of 1 year, and in the other case, where labor is involved, you have the penalty of 20 years."

* * * * * * * *

"Mr. Springer: May I ask my distinguished colleague on the Committee on the Judiciary if it is not a fact that under the provisions of this bill the question of penalty is left entirely discretionary with the court trying the case? Under the provisions of this bill a person could be penalized to the extent of 1 year or less than 1 year or up to 20 years, all in the discretion of the court.

"Mr. Celler: Or his sentence might be suspended. I agree with the gentleman. But why do we single out labor and impose even a possible penalty of 20 years? Psychologically, that is abhorrent, to my way of thinking, especially since innocent labor acts, lawful acts, might be interdicted, especially if my amendment shall not prevail. That will be seized upon by everyone who has any opposition to the bill and will be exaggerated all out of its importance."

* * * * * * * *

"Mr. Hancock: The gentleman is basing his entire argument on the false premise that this bill is aimed at labor. This is a bill of general application. It covers the most heinous crimes the criminal statute book contemplates. It had its origin in the activities of the Dillinger gang. All this bill does is abolish the double standard which Justice Byrnes established and makes labor responsible for crimes just as well as those who are not laborers. That is all it does."

* * * * * * * *

(89 Cong. Rec. 3205.)

"Mr. Graham: * * * One of our colleagues I believe the gentleman from New York [Mr. Celler], referred to the fact that he was appalled—I think that was the language he used—at the penalty that was imposed under the provisions of this bill. Let me read you for a moment a brief definition of robbery under the criminal code. I am quoting from the criminal code, chapter 11, section 463:

"Robbery: Whoever, by force and violence, or by putting in fear, shall feloniously take from the person or presence of another anything of value, shall be imprisoned not more than 15 years.

"That has been the law of the United States for I do not know how long, probably 125 years; and all of a sudden Members become appalled. As stated in the committee by the author of this bill, he made a compilation of the penalties for robbery in the 48 States of the Union, and by averaging those found that they average 20 years. Am I correct in that?

"Mr. Hobbs: They averaged 20 years.

* * * * * * *

"Mr. Celler: Justice Byrnes in his decision stated there was no attempt on the part of Congress to interfere with the traditional activities of labor unions. We put in the Copeland Act a specific provision which favored the traditional activities of labor unions. Therefore, the original act as well as this bill is aimed at labor. It seeks to do away with the excesses and racketeering of the Dillinger type. That being the case, should not we have been more careful in providing penalties rather than put a 20-year penalty in this bill?

(89 Cong. Rec. 3207.)

"Mr. Sadowski: * * * The most highly publicized antilabor bill now before Congress is the Hobbs bill. The sponsors of this bill call it an Antiracketeering Act. We all agree that racketeering should be ended and that the punishments for racketeering should be severe. However, there is already an antiracketeering statute in Federal law which is called the Antiracketeering Act of 1934.

"The trouble with the Hobbs bill is that it can be construed by the courts to prohibit and punish most of the legitimate activities of organized labor. Under its provisions a man who voted for a strike or walked the picket line would run the risk of being sentenced to a maximum of 20 years in prison or to be fined $10,000 or both. Whatever the proponents of the proposed measure may say, the language of the Hobbs bill is so broad that it constitutes a serious menace to all that organized labor has struggled for, bled for and even died for through many decades."

(89 Cong. Rec. 3208.)

"Mr. Brehm: The gentleman from Michigan [Mr. Sadowski] in his remarks stated that any member of organized labor voting in favor of a strike or engaging in peaceful picketing could, under the Hobbs bill, be subject to a fine of $10,000 or 20 years in the penitentiary. Upon the answer to the question, Is this correct? depends the way I will vote. I want to know if that is a true statement."

(89 Cong. Rec. 3223.)

Mr. Miller of Connecticut * * *

"Can anyone justify sending a union member to prison for 20 years for committing a misdemeanor dur-

ing a labor dispute when a nonunion member, guilty of the same offense under different circumstances, would receive a fine of possibly $25!"

(89 Cong. Rec. 3226.)

Mr. Robsion of Kentucky * * *

"There is some objection to the penalties prescribed in this bill for robbery and extortion. It has gone forth to the country that the penalty is 20 years. That is not a correct statement. The penalties range from 1 hour up to 20 years, according to the offense, and fines of $1 to $10,000. In other words, the 20 years and the $10,000 fine are the maximum. The court can fix any length of time of imprisonment up to 20 years or any fine up to $10,000, or both. The court might fix the penalty at 1 hour in jail and then in an aggravated case it might fix the penalty at 20 years. It could fix a 1-cent fine or in an aggravated case a $10,000 fine. The judge can impose a fine or imprisonment or both according to the evidence.

"In Kentucky a person may be sentenced to life imprisonment or put to death for robbery and for extortion in certain cases. The average maximum imprisonment for all the States is about 20 years.

"I am not much worried over the penalties imposed on anyone who actually commits robbery or extortion, in taking money or property or other thing of value from another person by force or violence or by putting him in fear. No individual or group should be permitted to engage in robbery or extortion in this free land of ours, even a church or association of ministers."

(89 Cong. Rec. 3228.)

"Mr. Day. Mr. Chairman, I wonder if the committee is not guilty of some inadvertence in their defini-

tion of the word 'extortion' on page 2, section (c). I ask the author of the bill to follow me closely. I read:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear—

"Up to that point it would amount to duress, it is clear intimidation or extortion. Then it states: "or under color of official right.

"I want to ask this, and if you do not mean this in the bill, then so state in the interest of clarification of the future enforcement of this act and for the benefit of the House. Inasmuch as the first section of this bill carries a penalty of 20 years and a fine of $10,000, it is not wartime legislation, but is permanent legislation, and an amendment of the act of June 18, 1934.

"When you say that by extortion you mean getting money or property from a man with his consent or under color of official right, it would apply to an initiation fee in a labor union.

"Mr. Hobbs: Certainly not. 'Color of official right' means absence of right but pretended assertion of right."

(89 Cong. Rec. 3229.)

"Mr. Day: That is just the point. A union official might be indicted and face a 20-year sentence in a Federal penitentiary or $10,000 fine. Not only that, but there might be great hardship to himself and his family if there should be some careless construction of this language. I think this is very important."

* * * * * * *

"Mr. Sumners of Texas: May I suggest to my friend that if he will examine the language carefully I believe he will conclude that it means money acquired by some

person who claims to be an officer of the law who is trying to take his money."

* * * * * * * *

"Mr. Fish: Mr. Chairman, I offer an amendment which I send to the Clerk's desk.

"The Clerk reads as follows:

"Amendment offered by Mr. Fish: page 3, line 13, after the word 'than', strike out 'twenty' and insert 'ten.'

"Mr. Fish: Mr. Chairman, I will only require a minute to speak on this amendment. When the bill was before the Rules Committee it seemed to me at that time that these penalties were excessive. Twenty years is just about as bad as a life sentence, and I want to give the House the opportunity to reduce it by cutting it in half. This applies to threats. A man may be sent to jail for 20 years merely for threatening extortion. Such a drastic and severe penalty takes you back to the dark ages and is not warranted or in line with the offense."

* * * * * * * *

"Mr. Hobbs: Mr. Chairman, I rise in opposition to the amendment offered by the gentleman from New York [Mr. Fish].

"Mr. Chairman, the punishment fixed in this bill is a maximum, and any punishment imposed by a judge of 1 cent or 1 hour in jail would be covered by this maximum penalty just the same. May I point out to the House again that this bill was copied substantially from the New York statute which punishes first-degree robbery by a minimum punishment of 10 years and a maximum of 30 years. We took the average of 20 as the maximum, with no minimum. I think the gentleman is amply protected in his desire for the penalty

to be reasonable and all we are doing is giving the court the right to make the punishment fit the crime."

* * * * * * *

"Mr. Walter: May I call the attention of the House to the fact that title 2 of the act applies to the most heinous offense conceivable, namely, interference with troop trains in time of war, and conceivably the punishment would not be adequate if there would be a violation of that title of the act."

* * * * * * *

"Mr. Vorys of Ohio: Does not the definition also cover third-degree robbery, which, under the New York law, carries a maximum penalty of 10 years?

"Mr. Hobbs: I do not so understand it.

"Mr. Vorys of Ohio: That is in the New York law. Does not the present law have a maximum of 10 years?

"Mr. Hobbs: I may say to the gentleman that in other sections of New York law that is true, but not in the section I substantially quoted.

"Mr. May: Will the gentleman yield?

"Mr. Hobbs: I am glad to yield to the gentleman from Kentucky.

"Mr. May: The purpose of the maximum penalty in the bill, as I understand it, would be to allow room for aggravated cases?

"Mr. Hobbs: To enable the judge, who tried the case and heard the evidence, make the punishment fit the crime."

* * * * * * *

On January 3, 1945, at the 79th Congress, Mr. Hobbs introduced H. R. 32, the bill which was enacted into law in 1946. This bill was identical with the amended version of H. R. 653 which the House had passed during the 78th Congress. During the House debates on H. R. 32 the following statements were made:

(91 Cong. Rec. 11845.)

"Mr. Bradley of Michigan. * * *

"It provides for punishment by imprisonment for not more than 20 years or by a fine of not more than $10,000, or both."

* * * * * * * *

(91 Cong. Rec. 11846.)

"Mr. Sabath: * * *

"Mr. Speaker, I oppose this bill because I think it goes altogether too far. It makes a felony out of a misdemeanor and then provides for imprisonment up to 20 years and/or a fine of $10,000 for just stopping a truck. Those provisions are altogether out of line and not really same; consequently, I am opposed to such punishment as provided in this bill."

* * * * * * * *

(91 Cong. Rec. 11901.)

"Mr. Celler: * * *

"Attorneys familiar with the decisions of the courts on charge of 'violence' in labor relations can tell of the implications to labor in a statute worded as is the instant bill. There are courts which, in injunction cases and in disorderly conduct cases, have held name-calling or use of such terms as 'scab' to constitute 'force' or 'violence.' Whatever may be your views as to whether such name-calling should properly be considered disorderly conduct under local ordinances or statutes, it should be kept in mind that the pending bill is defining conduct which would become a felony, punishable by imprisonment up to 20 years, or by a fine of up to $10,000, or both.

"This problem has another aspect. It is generally recognized that some, if not all, labor disputes are un-

fortunately marked by heated tempers on both sides. It is unfortunately true that in some instances in the heat of labor disputes there will be minor altercations on the picket line. There will be occasional scuffles between partisans. And truly criminal conduct which may occur in the course of these altercations and scuffles is, of course, punishable by local disorderly conduct statutes or ordinances or other local laws. Under the Hobbs bill every such altercation is automatically raised to the level of a Federal offense—a Federal felony the punishment for which may be as high as 20 years in jail or $10,000 in fine.

"Nor is that all. Those dangers are not even limited to the persons who may take part in the strike or in the picket line and certainly not to the persons who may be actually involved in the altercations or in the name-calling or other incidents which under this bill would become felonious.

"Section 3 of this bill makes equally felonious the conduct of those who 'conspire' with or 'act in concert' with others to commit the acts which are prohibited by the bill. Now, if a strike is 'force,' within the meaning of the other sections of the bill, then obviously not only the strikers are guilty of felony but all those who voted for the strike at the union meeting. Indeed, all those who are members of the union may be involved, since by their membership in the organization they may be found either to have 'conspired' or to have 'acted in concert' with strikers. By the same token, all of the workers on the picket line, and, indeed, all of the members of the union, may be found to have 'conspired' or to have 'acted in concert' with the individual or individuals who may have become engaged in an altercation found to constitute a felony under the bill."

* * * * * * *

(91 Cong. Rec. 11902.)

"Mr. Celler: * * *

"Further, you place penalties on these legitimate activities of labor that go up to 20 years in jail and up to $10,000. If you look at the antitrust penalties against employers you find that they are only $5,000 or 1 year in jail. This bill has direct relation to the antitrust laws, the Clayton Act. Examine those acts and see what you do to the malefactors in organizations like the National Manufacturers' Association and the United States Chamber of Commerce. You treat them rather gently if they are guilty of these offenses involving the antimonopoly statutes. You inflict a penalty of only $5,000, but on the laboring man you inflict a penalty of $10,000 or, in the alternative, 20 years in jail. If that is not a harsh and unjustifiable penalty, I would like to know what is."

* * * * * * *

(91 Cong. Rec. 11916.)

"Mr. Biemiller: * * *

"We fear, for example, under the bill as it now stands, that a simple, unfortunate altercation on a picket line—and we all know that human beings are frail and when tempers are hot some trouble may develop—under such a situation you may send a man to jail for 20 years or fine him $10,000. May I further point out, gentlemen, that that is double the penalty of the antitrust laws. The law proposed for labor is much harsher than that applied to monopolists who are guilty of restraint of trade."

* * * * * * *

(91 Cong. Rec. 11917.)

"Mr. Sabath: * * *

"In conclusion may I call attention to the gentlemen from Iowa and a few others of the activities of the farmers when, in 1932 and several times since, they overturned hundreds of trucks bringing milk to dairies in Chicago because their demands for higher prices were refused. At that time I did not hear any demand for legislation that would provide 20-year imprisonment or $10,000 fine for these violations as this bill does. In fact, this bill provides for such imprisonment if some person would charge that he fears that some act may be intended against him."

Act of July 3, 1946, 60 Stat. 420.

AN ACT.

To amend the Act entitled "An Act to protect trade and commerce against interference by violence, threats, coercion, or intimidation," approved June 18, 1934.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to protect trade and commerce against the interference by violence, threats, coercion, or intimidation", approved June 18, 1934 (48 Stat. 979; U. S. C., 1940 edition, title 18, secs. 420a-420e), be, and it is hereby amended to read as follows:

TITLE I.

Sec. 1. As used in this title—

(a) The term "commerce" means (1) commerce between any point in a State, Territory, or the District of Columbia and any point outside thereof, or between points within the same State, Territory, or the District of Columbia but through any place outside thereof, and (2) commerce

within the District of Columbia or any Territory, and (3) all other commerce over which the United States has jurisdiction; and the term "Territory" means any Territory or possession of the United States.

(b) The term "robbery" means the unlawful taking or obtaining of personal property, from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or anyone in his company at the time of the taking or obtaining.

(c) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of Section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Sec. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both.

TITLE II.

Nothing in this Act shall be construed to repeal, modify, or affect either section 6 or section 20 of an Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, or an Act entitled "An Act to amend the judicial code and to define and limit the jurisdiction of the courts in equity, and for other purposes", approved March 23, 1932, or an Act entitled "An Act to provide for the prompt disposition of disputes between carriers and their employees, and for other purposes", approved May 20, 1926, as amended, or an Act entitled "An Act to diminish the causes of labor disputes burdening or obstructing interstate or foreign commerce, to create a National Labor Relations Board, and for other purposes", approved July 5, 1935.

Committee Report on an act providing for punishment for conspiring to violate the counterfeiting laws.

In 1944, Chapter 7 of the Criminal Code, as amended (U. S. C. 1940 edition, Title 18, Ch. 7), was amended by adding section 178 (a), which increased the punishment for conspiring to violate the counterfeiting laws. Senate Report No. 1039, 78th Cong., 2d Sess., stated in respect to that bill:

"The Committee on the Judiciary, to whom was referred the bill (S. 725) to provide for the punishment of persons conspiring to violate the laws relating to counterfeiting, and certain other laws, having considered the same, do now report the bill to the Senate favorably, without amendment, and recommend that the bill do pass.

"General Statement.

"This bill would strengthen the hand of the Secret Service in dealing with ringleaders among counterfeiting criminals.

"The bill is explained in the following letter dated October 25, 1943:

"Treasury Department,
October 25, 1943.

"Hon. Frederick Van Nuys,
Chairman, Committee on the Judiciary,
United States Senate.

"Dear Mr. Chairman: The attention of this Department has been called to S. 725, to provide for the punishment of persons conspiring to violate the laws relating to counterfeiting, and certain other laws, which has been referred to your committee.

"The proposed legislation was submitted to the Seventy-seventh Congress by the Treasury Department in letters dated May 22, 1941, addressed to the President of the Senate and the Speaker of the House of Representatives. It was introduced as S. 1799 and H. R. 4934 and was passed by the House on April 20, 1942. However, no further action was taken by the Senate before adjournment. The Department is vitally interested in the bill and would like to take this opportunity to urge favorable consideration of the legislation.

"The bill is designed to remedy an anomalous situation that exists under the criminal statutes relating to counterfeiting. The provisions of the Criminal Code relating to counterfeiting provide for penalties up to 15 years of imprisonment. However, the general conspiracy statute (U. S. C., title 18, sec. 88), under which

prosecutions for conspiracy to violate the provisions of law pertaining to counterfeiting are brought, carries a maximum penalty of only 2 years. The smaller penalty for conspiracy permits criminals, who are ringleaders and against whom the substantive offense cannot be proved, to escape with a much lighter punishment than less serious offenders receive.

"The following two cases illustrate the manner in which the lighter penalty for conspiracy operates to the benefit of the ringleader of counterfeiting activities. For several years information was supplied to Secret Service agents in New York that one Joseph Esposito, alias 'Don Pepe, the Mechanic,' made and sold plates for counterfeit notes to operators of counterfeiting plants and sold large quantities of counterfeit notes to various persons. Esposito was placed under surveillance, and although it was certain that he was engaged in counterfeiting activity, it was impossible to prove such activity directly. However, in 1938, one John Palmiere, who was serving a 9-year sentence on a counterfeiting charge, furnished valuable information which resulted in the arrest of 17 persons, including Esposito. Investigation confirmed the fact that Esposito had dealt for years in large quantities of counterfeit notes and plates and had even traveled to the west coast to dispose of $20,000 in counterfeit notes in the State of California. The substantive offense of making counterfeit notes and plates could not be proved against Esposito and on February 17, 1939, he received a sentence of only 2 years, the maximum penalty that it was possible to impose under the conspiracy statute. Presiding Judge Grover Moscowitz openly expressed regret that the conviction had not been on the substantive counts so that a more severe sentence could have been imposed. Ironically, John Palmieri, who admitted his complicity with Es-

posito and whose information made Esposito's arrest and conviction possible, received a penitentiary sentence of 9 years on a substantive counterfeiting charge, while Esposito, who was a far more dangerous offender than Palmieri, was able to escape with only a 2-year sentence due to the limitations of the existing conspiracy statute.

"Another case which demonstrates the need for the proposed legislation involved the sale of $3,000 in counterfeit $20 Federal Reserve notes by one Ranulto Delgadillo to Wiley C. Bullard and Dillard L. Lane at Juarez, Mexico. Bullard and Lane were associated with five other persons in passing the notes in Texas, Louisiana and Arkansas. Secret Service agents eventually arrested the distributor, Delgadillo, and the seven persons who engaged in passing the counterfeit notes he had sold. The seven passers of the notes entered pleas of guilty to conspiracy and to the substantive count of the indictment charging them with the possessing and passing the counterfeit notes and were sentenced to prison terms ranging from 2 to 15 years each. Delgadillo, the actual source of the counterfeits, could be charged only with conspiracy, since the sale of the notes had taken place in Mexico and could not properly be the basis for his prosecution in the United States. As a result it was possible to impose a sentence of but 2 years upon him. That sentence was decidedly disproportionate to the sentences of the other defendants, particularly in regard to Lane and Bullard, who received 12 and 16 year sentences, and whose participation in the counterfeiting scheme was directly attributable to the sale of the notes by Delgadillo.

"The bill would remove the discrimination which exists in favor of the ringleaders of counterfeiting enterprises by providing that the punishment for conspiracy shall be the same as the punishment for the

violation of the specified substantive provision of the law. The enactment of the legislation would make possible the imposition of sentences upon such persons more commensurate with the magnitude of their participation in the illegal enterprises and would greatly assist the Secret Service Division of the Treasury Department in the suppression of counterfeiting. The bill follows a procedure that has already been adopted by Congress in cases involving unlawful disclosure of information affecting the national defense, or seditious or disloyal acts or words in time of war (U. S. C., title 50, sec. 34); in cases involving the transportation of stolen property in interstate commerce (U. S. C., title 18, sec. 418a); and in cases involving false representations made in connection with the operation of production credit associations and corporations, and regional and central banks for cooperatives (U. S. C., title 12, sec. 1138a (f)).

"The Director of the Bureau of the Budget has advised that there is no objection to the Department's recommending the enactment of the legislation.

Very truly yours,

(Signed) Herbert E. Gaston,
Acting Secretary of the Treasury."

No. 47

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JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

LAWRENCE CALLANAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 33-40) is reported at 274 F. 2d 601. The opinion of the district court (R. 21-31) is reported at 173 F. Supp. 98. The original conviction was affirmed at 223 F. 2d 171, certiorari denied, 350 U.S. 862.

JURISDICTION

The judgment of the court of appeals was entered February 2, 1960. The petition for a writ of cer-

tiorari was filed March 1, 1960, and was granted on April 4, 1960 (R. 42, 362 U.S. 939). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether consecutive sentences could properly be imposed on convictions for conspiracy to violate the Hobbs Anti-Racketeering Act and for a substantive extortion offense thereunder.

STATUTES AND RULE INVOLVED

18 U.S.C. 1951(a), commonly called the Hobbs Anti-Racketeering Act, as revised in 1948, provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (Subsection (b) defines robbery, extortion and commerce.)

The Hobbs Act, as passed, 60 Stat. 420, read in pertinent part:[1]

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce,

[1] Section 1 contained the definitions of commerce, robbery, and extortion.

by robbery or extortion, shall be guilty of a felony.

Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Sec. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both.

The predecessor of the Hobbs Act—the Anti-Racketeering Act of 1934, 48 Stat. 979-980—read in pertinent part:

That the term "trade or commerce", as used herein, is defined to mean trade or commerce between any States, with foreign nations, in the District of Columbia, in any Territory of the United States, between any such Territory or the District of Columbia and any State or other Territory, and all other trade or commerce over which the United States has constitutional jurisdiction.

Sec. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use

of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of $10,000, or both.

* * * *

18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more person conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The conspiracy statute applicable in 1934, 35 Stat. 1096, read:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Rule 35 of the Federal Rules of Criminal Procedure provides:

> *Correction or Reduction of Sentence*
>
> The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

On March 3, 1954, the petitioner and others were indicted under a two-count indictment in the United States District Court for the Eastern District of Missouri (R. 1-9). Count I charged a conspiracy between the petitioner and four others to violate the Hobbs Anti-Racketeering Act, 18 U.S.C. 1951 (R. 1-6). Count II charged the petitioner and others with a substantive offense of extortion under the provisions of the same Act (R. 6-9).

On July 19, 1954, after conviction by a jury,[2] the petitioner was sentenced to consecutive terms of 12 years on Count I and 12 years on Count II. However, execution of the sentence on Count II was suspended, and the petitioner was placed on probation for 5 years to commence with his release under Count I (R. 10-11). The conviction was affirmed on appeal. 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862.

On December 17, 1958, the petitioner filed a motion invoking the provisions of either Rule 35, F. R. Crim. P., or 28 U.S.C. 2255, for correction of his sentence on Count I (R. 11-13). He claimed that Count I charged a conspiracy to commit the same offense set forth in Count II (R. 12-item (4)); that the maximum penalty under the Act for obstructing commerce by any means was twenty years (R.13-

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[2] The evidence may be briefly summarized as follows (R. 14-21):

All the defendants named in the indictment were ostensibly representatives of labor unions. The petitioner represented the pipefitters. In 1951, O. R. Burden Construction Company encountered "slow-ups" and other labor activities which resulted in higher labor costs than those for similar work in comparable regions. In 1952, prior to commencing work on an interstate pipe line, a meeting was held with labor representatives to discuss the job. Later, the petitioner, Callanan, had lunch alone with Mr. Burden. Mr. Callanan suggested that Burden pay a percentage to expedite the job. The money was subsequently paid through fictitious companies. For example, payments were made to the petitioner through the fictitious Pipeline Welders' Supply Company, and to defendants Thompson, Porter and Secor through the Washington Equipment and Construction Company. In all $28,000 was paid.

item (7)); that Congress did not intend to subject a person to two penalties for obstructing commerce (R. 13-item (8)); that, therefore, the petitioner should be subject only to a total sentence of 20 years rather than the 24 years imposed (R. 13-item (9)), and, accordingly, the court should reduce the sentence on Count I by four years (R. 12).

The district court denied the petitioner's motion on May 8, 1959 (R. 32-33), in an extensive opinion discussing the legal issues raised (R. 21-31). The court held that it was well established that one charged with conspiracy to violate a federal law, and separately charged with an act which was the object of the conspiracy, could be "sentenced separately on each count or offense" (R. 24) and that the elements of the offenses were different (R. 25). Therefore, since the sentence was not illegal, Rule 35, F. R. Crim. P., was not applicable (R. 27). The court held that the remedy sought under 28 U.S.C. 2255 was premature because the petitioner was not claiming the right to be released, since the sentence on Count I, which was being served, was not invalid, and service of the sentence on Count II might never commence, unless the petitioner committed an act to violate his 5 years probation (R. 31).

This ruling was unanimously affirmed by the Court of Appeals for the Eighth Circuit (R. 33-40). The court of appeals agreed that petitioner could be separately punished for each offense charged and therefore neither Rule 35 nor a proceeding under 28 U.S.C. 2255 was applicable. It further held that in any event neither procedure could be used to raise

an issue as to the sentence which could have been, but was not, raised on appeal.

SUMMARY OF ARGUMENT

The government conceded in its brief in opposition that, if the illegality of a sentence appears from the face of an indictment and judgment, it may be corrected under Rule 35, F. R. Crim. P., even though previously affirmed on direct review. *Heflin* v. *United States*, 358 U.S. 415. On the other hand, the petitioner, who is now released on parole, no longer presses for a reduction of 4 years from one of his consecutive sentences, but urges that consecutive sentences for conspiracy to violate the Hobbs Anti-Racketeering Act and for an extortion under the Act, are improper under a "rule of lenity." It is the government's view that, in determining the intent of Congress in this legislation, consideration must be given to the long-settled doctrine that a conspiracy and a substantive offense committed pursuant thereto are separately punishable, and that there is no indication that Congress intended to change this established rule with respect to anti-racketeering offenses.

A. 1. The cases have consistently treated a conspiracy to commit a crime and the resulting substantive offense as separately punishable. This Court has so decided in cases ranging from *United States* v. *Hirsch*, 100 U.S. 33, through *Pereira* v. *United States*, 347 U.S. 1. These cases include *Carter* v. *McClaughry*, 183 U.S. 365, holding that two violations consisting of conspiracy and the resulting substantive crime, even under one Act, are separately

and cumulatively punishable, and *Pinkerton* v. *United States*, 328 U.S. 640, 643, holding "that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses."

2. It is equally well established that there is no merger between the substantive offense and a conspiracy to commit it.

3. The separateness of the crime of conspiracy results from the long-recognized concept that combining for purposes of planning a crime constitutes a danger to the public, sometimes outweighing the commission of the contemplated crime.

B. The legislative history of the anti-racketeering statutes shows no intention to depart from the settled principle that a conspiracy and the resulting substantive offense may support separate sentences. The original Act was passed at a time when not only were conspiracy and substantive offenses separately punished, but when separate crimes defined in one statute were generally regarded as separately punishable. Furthermore, the history of the legislation indicates a decided effort to increase punishment, an intent inconsistent with lenity.

1. The 1934 Act resulted from the Copeland Committee investigations of racketeering. The conspiracy section of the statute was added pursuant to a suggestion in a letter from Attorney General Homer Cummings. The purpose of the Act was to provide, for racketeering, greater penalties and broader terms than those contained in the Sherman Act. In the light of the existing law as to the separateness of conspiracy, the Attorney General must have intended

an increase in the punishment for a conspiracy to violate the Anti-Racketeering Act, since the general conspiracy clause, *supra*, p. 5, then in effect limited the punishment to two years. In view of this specific separate treatment of conspiracy in the Anti-Racketeering Act, regardless of how other sections may be interpreted, it seems evident that the added conspiracy clause was designed to carry a separate punishment.

2. The Hobbs Amendment became law in 1946. Its primary purpose was to legislate a change in interpretation as applied to the type of employee relationship involved in *United States v. Local 807*, 315 U.S. 521. However, more important to this case, the penalty was increased from "from one to ten years," to "not more than twenty years." This cannot be interpreted as consistent with any theory of lenity. Also, the structure of the Hobbs Act tends to suggest that the separate subsections were intended to deal with separate offenses rather than to deal with a single offense.

3. In 1948 the Act was condensed as part of a general revision of the Criminal Code. At the same time many conspiracy clauses relating to other offenses were dropped as being adequately covered by the general conspiracy clause. However, the conspiracy clause in the Hobbs Act was retained since the general clause merely provided a 5-year penalty while the Hobbs Act punishment was greater. Certainly, Congress could have excluded the possibility of punishment for both conspiracy and a substantive offense, as has been done in Wisconsin, but in the

light of the established doctrine special wording would have been essential to depart from the established view that a conspiracy is separately punishable from the resulting substantive crime.

C. The rule of lenity does not alter the result here. Congress intended to deal sternly with the offenses which it condemned. Cf. *Gore* v. *United States*, 357 U.S. 386. There is no special legislative history suggesting one offense rather than two, as this Court found in the Bank Robbery Act, *Prince* v. *United States*, 352 U.S. 322, or the Fair Labor Standards Act, *United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218. There is a clear "controlling gloss", lacking in *Bell* v. *United States*, 349 U.S. 81, 83, a whole century of judicial decisions interpreting a conspiracy and the resulting substantive crime as separate and distinct. Specifically, in the Anti-Racketeering Acts there is every reason to apply the settled principle that combination is itself a crime separate from any resulting crime, and hence separately punishable.

ARGUMENT

In view of the ruling of the court below (*supra*, pp. 7-8), the petition for a writ of certiorari raised the question of whether the fact that a conviction had been reviewed on appeal precluded the petitioner from attacking the legality of consecutive sentences imposed on separate counts of the indictment. On this issue, the government conceded in its brief in opposition that this Court has held that, where it

appears from the face of an indictment and judgment that a sentence is illegal (either because it is excessive or because it imposes double punishment for the same offense), the error is one which may be corrected on collateral attack. *Ex parte Lange*, 18 Wall. 163; *In re Snow*, 120 U.S. 274. Since the enactment of Rule 35, F. R. Crim. P., it has been held that such a motion to correct lies under that rule when the claim of illegality is based on the face of the indictment. Such a motion was considered by the Court even though the judgment had formerly been affirmed on direct review. *Heflin* v. *United States*, 358 U.S. 415.

On the other hand, the petitioner who, in the district court, made an elaborate argument seeking to have four years cut off his prison sentence, rather than merely to have his consecutive suspended sentence removed, no longer presses any such argument.[3] He now urges merely that consecutive sentences could not properly be imposed on both counts of the indictment.

Thus, the only contested issue before this Court is whether conspiracy to violate the Hobbs Act and a substantive offense committed pursuant to that conspiracy are separate offenses for which consecutive sentences may be imposed. The petitioner argues that since, in the Hobbs Act, both the conspiracy and the substantive offenses were created by the same statute, under the "rule of lenity" the conspiracy and

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[3] The petitioner started service of his prison sentence in 1954. He was paroled in April 1960.

substantive offense should be deemed alternative means of violation, rather than separate crimes. It is our view that, in determining the intent of Congress in this legislation, consideration must be given to the long settled doctrine that a conspiracy and a substantive offense committed pursuant thereto are separate. There is no indication in this Act that Congress intended to change this established rule as to the separateness of conspiracy and the substantive offenses.

Congress Intended Conspiracy and Substantive Offenses Under the Hobbs Act To Be Separately Punishable.

A. ***A conspiracy to commit a crime and the resulting substantive offense have long been treated as separate crimes for purposes of punishment.***

1. From *United States* v. *Hirsch*, 100 U.S. 33, in 1879, through *Pereira* v. *United States*, 347 U.S. 1, this Court has consistently recognized that a conspiracy to commit an offense, and the resulting offense, are distinct crimes to be separately punished, except for that limited class of substantive offenses which require, by definition, more than one participant.[4] This has been the conclusion regardless whether the attack was in terms of construction or on the basis of rules of law relating to double

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[4] *United States* v. *Katz*, 271 U.S. 354; *Gebardi* v. *United States*, 287 U.S. 112; *United States* v. *Zeuli*, 137 F. 2d 845 (C.A. 2).

jeopardy or merger of offenses, and notwithstanding variations in the wording or formal position of the various conspiracy clauses.

In *Hirsch*, 100 U.S. 33, this Court held that, for purposes of determining which statute of limitations applied, a conspiracy to violate the revenue laws was an offense under general law rather than under the revenue laws.[5] It was recognized that the crime of conspiracy was distinct from the object of the agreement, the foundation of the conspiracy offense being characterized as a "combination of minds in an unlawful purpose", *supra*, 100 U.S. at 34. The seriousness of the separate offense of conspiracy was recognized in *Callan* v. *Wilson*, 127 U.S. 540, which held that a conspiracy was not a petty offense and hence the constitutional guarantee of trial by jury was applicable. The essential separateness of the punishment for conspiracy was decided in *Clune* v. *United States*, 159 U.S. 590. There, the substantive offense of obstructing the mail carried a maximum fine of $100, while the maximum punishment for the crime of conspiracy was a fine of $1,000 to $10,000, and imprisonment up to 2 years. The Court held that a conspiracy was a separate offense, saying (159 U.S. at 595):

> Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the

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[5] At that time the statute of limitations for revenue offenses was five years while the general statute of limitations was only three years. Cf. 26 U.S.C. 6531(8).

> doing of the act itself, it is a matter to be considered solely by the legislative body* * *.*

The controlling principle, for purposes of the case at bar, was set forth in *Carter* v. *McClaughry*, 183 U.S. 365. There, of four charges in a court-martial, the first two charges were within the same 60th Article of War, which had one punishment clause of a fine or imprisonment. *Id.* 390-392. The first charge was a conspiracy to defraud the United States and the second charge, based upon the same article, was the substantive offense of causing fraudulent claims to be made against the United States. The offenses (*Id.* at 390-392) were separated only by paragraphs and the word "or" (just as in the Anti-Racketeering Act of 1934, *supra*, pp. 3-4). On conviction, Carter was both fined and imprisoned. In an habeas corpus proceeding he contended that he was twice placed in jeopardy as a result of one transaction for which only one punishment could be imposed. This Court held that the fact that the charges grew out of one transaction "made no difference" since each required proof of different facts (*Id.* at 394-395). In upholding the punishment, which was greater than that authorized for any single offense, the Court held (183 U.S. at 394):

> Cumulative sentences are not cumulative punishments, and a single sentence for several offenses, in excess of that prescribed for one of-

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* It was not until the 1948 Criminal Code Revision that Congress made any substantial adjustment in punishment for conspiracy. 18 U.S.C. 371. See also the 1944 amendment, 58 Stat. 752.

> fense, may be authorized by statute. *In re De Bara*, 179 U.S. 316; *In re Henry*, 123 U.S. 372.

Similarly, *Williamson* v. *United States*, 207 U.S. 425, held that the crime of conspiracy is separate and distinct and "without reference to whether the crime which the conspirators have conspired to commit is consummated" (*Id.* 447); and *United States* v. *Stevenson* (*No. 2*), 215 U.S. 200, recognized that the punishment for the crime of conspiracy can be much greater than that which is imposed on a substantive offense—there, only a civil penalty (*Id.* 203). This was summarized by Mr. Justice Holmes in *Heike* v. *United States*, 227 U.S. 131, in answer to the claim that the defendant there, if guilty, was guilty of the substantive crime (227 U.S. at 144):

> At all events the liability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offence at which the conspiracy aims. * * *

In *United States* v. *Rabinowich*, 238 U.S. 78, this Court held that even those who could not commit the objective substantive crime—concealing assets by a bankrupt—nevertheless could be guilty of conspiracy which "is a different offense from the crime that is the object of the conspiracy" (*Ibid.* at 85). Furthermore, in conformity with *Hirsch, supra*, this Court applied the general statute of limitations rather than that under the Bankruptcy Act. Significantly, for our purposes, the Court stated, as one reason for applying a different limit to the separate crime of conspiracy that it had (238 U.S. at 88):

> * * * attributed to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a distinction whose practical importance in the criminal law is not easily overestimated.

By the time *Pinkerton* v. *United States*, 328 U.S. 640, was decided, it was possible for this Court to conclude (*Ibid.* 643):

> It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. * * *

In *Pinkerton*, the Court described a conspiracy as having "ingredients, as well as implications, distinct from the completion of the unlawful project" (*Id.* 644) and held that since there was no merger the sentence could exceed that imposed for the conspiracy alone.[7]

To like effect is the interpretation of conspiracy and cumulative sentences under the Sherman Act, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 788-789, as well as between court-martial and

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[7] In fact, one of the questions presented in *Pinkerton*, *supra*, was directed toward the problem of the extent of punishment allowable, which is in terms substantially the same as the question at bar. See the Government's Brief, No. 719, O.T. 1945, p. 3:

"Whether on petitioners' convictions upon an indictment charging in one count a conspiracy to violate various provisions of the Internal Revenue Code and in other counts substantive offenses in violation of one of those provisions, they could validly be sentenced on the substantive counts to a term of imprisonment exceeding the two year maximum penalty provided for by the conspiracy statute, which had been imposed upon them on the conspiracy count."

civilian conspiracy in *United States* v. *Bayer*, 331 U.S. 532, 542.

The doctrine of separateness was so well established when this Court decided *Pereira* v. *United States*, 347 U.S. 1, that in connection with the conspiracy count it was stated (347 U.S. at 11):

> It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. * * *

2. Equally well established is the principle that there is no merger between the substantive offense and a conspiracy to commit it. In *Pinkerton*, *supra*, this Court noted (328 U.S. at 643):

> The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country.

The original objection at common law on the basis of merger was not expressed in terms of "steps in a crime", but was based solely on the procedural differences flowing from trials of misdemeanors—e.g., conspiracy—as compared to trials of felonies. See *Graff* v. *People*, 208 Ill. 312, 320-321, and 2 University of Chicago Law Review 485. Therefore, the normal rule was that a misdemeanor merged into a felony, regardless of whether the misdemeanor was a conspiracy. In any event, it is clear that this doctrine never gained a foothold in the United States in connection with a substantive crime and a conspiracy. See the consistent and extensive list of cases collected in 37 A.L.R. 778 and 75 A.L.R. 1411.

3. The reason for this long recognition of the separateness of the crime of conspiracy, reflected throughout the decisions, is the concept that combining for the purpose of planning a crime is itself an evil which may be greater than the consummation of the crime by one individual. As this Court said in *United States* v. *Rabinowich*, 238 U.S. 78, 88, quoted with approval in *Pinkerton* v. *United States*, 328 U.S. at 644:

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. * * *

Or as Justice Jackson said in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 448-449, "to unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."

B. The legislative history of the anti-racketeering statutes shows no intention to depart from the well-settled doctrine that a substantive offense and a conspiracy to commit it may support separate sentences, but does clearly indicate an intent to punish severely.

The history of the anti-racketeering statutes gives no indication of any intent to depart from settled doctrine of applying separate sentences to the distinct crimes of conspiracy and substantive offense. The Act originated in 1934, at a time when not only

were conspiracies and substantive offenses recognized as separate, but when crimes separately defined in one statute were generally regarded as separately punishable.[8] Beyond this, however, the history of the Act shows that Congress regarded conspiracy to commit crimes under this Act as serious, and dealt separately with that offense. The history also shows a decided effort on the part of Congress to increase the punishment, an attitude of severity rather than lenity.

The origin of the present statute is the Anti-Racketeering Act of 1934. That Act was amended by the Hobbs Anti-Racketeering Act of 1946, and, in turn, the Hobbs Act was codified in the 1948 revision of the criminal code.

1. *The 1934 Act.*

The bill was introduced as one of 13 which resulted from investigations of racketeering by the Copeland Committee (see discussion in *United States* v. *Local 807*, 315 U.S. 521, 528-529). As originally proposed, it contained no conspiracy provision. 78 Cong. Rec. 457-458. The memorandum from the Department of Justice which accompanied the original draft indicated that the proposed bill was designed to provide a substitute for the attempt to prosecute racketeering

[8] E.g. *Burton* v. *United States*, 202 U.S. 344, 377 (agreeing to receive and receiving a bribe); *Morgan* v. *Devine*, 237 U.S. 632 (forcibly breaking and entering with intent to commit larceny and stealing postage stamps); *Albrecht* v. *United States*, 273 U.S. 1, 11 (possession and sale of liquor), and *Blockburger* v. *United States*, 284 U.S. 299 (multiple sentences under the Harrison Narcotics Act).

under the Sherman Act. 78 Cong. Rec. 453.[9] The memorandum read in relevant part:

> This is a proposed Federal antiracketeering statute based on the interstate commerce power.
>
> In the past such persons have been prosecuted in the Federal courts for incidental violations of law, such as mail frauds or income-tax evasions. The nearest approach to prosecution of racketeers as such has been under the Sherman Antitrust Act. This act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the act by interpretations of the courts, the act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion. Furthermore, the Sherman Act requires proof of a conspiracy, combination or monopoly, and it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce, or a monopoly. Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce.

Following a suggestion contained in a letter from Attorney General Homer Cummings, the bill was amended by the House to include a conspiracy clause,

---

[9] This memorandum, signed by Walter L. Rice, Special Assistant to the Attorney General, was also partially reproduced in the Senate Report (S. Rep. No. 532, 73rd Cong., 2d Sess., pp. 1-2) and in pertinent part read on the Senate floor in response to a request for an explanation of the bill (78 Cong. Rec. 5735).

and the penalty was set at from one to ten years, or a fine of $10,000, or both. 78 Cong. Rec. 11403.[10] The letter stated as to this provision that the draft had "added a new provision prohibiting conspiracy as well as the substantive acts." It too expressed the need for heavier penalties, stating:

> The Sherman Antitrust Act is too restricted in its terms and the penalties thereunder are too moderate to make that act an effective weapon in prosecuting racketeers. * * *

In the light of the state of the law in 1934, both as to the separate character of offenses generally, and specifically as to the separateness of the crime of conspiracy, it is inconceivable that, in suggesting that conspiracy be defined in addition to the substantive offenses, the Attorney General thought he was suggesting an alternative method of committing the one offense defined in the statute. Rather, it seems evident that, since the general conspiracy statute at that time provided merely a two-year penalty (*supra*, p. 5), the specific addition of the special conspiracy clause was to increase its punishment from the two-year limit when the conspiracy was directed at a violation of the anti-racketeering statute. Otherwise, the substantive crime could have been punished under the Anti-Racketeering Act and the conspiracy could have been separately punished by only two years, under the then existing general conspiracy provision.

Furthermore, in the light of this specific separate treatment of the clause punishing conspiracy, there

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[10] The Attorney General's letter is contained in the House Report (H. Rep. No. 1833, 73rd Cong., 2d Sess., p. 2).

is no force, as to this conspiracy provision, in the petitioner's argument that various other portions of the statute overlap and hence that the various sections should be interpreted as constituting alternative ways of committing one offense. We do not believe that the substantive offenses overlap to the degree that the petitioner argues. Granted that some phraseology is repetitious and that it is possible to read them to overlap in some instances, it seems evident that the various sections were mainly directed at specific violations which were not necessarily alternatives. Thus, subsections (a) and (b) of Section 2 of the 1934 Act were most probably intended as alternative offenses and stemmed from the bill as originally introduced in the Senate.[11] Subsections (c) and (d) did not directly involve racketeering or hijacking but contemplated offenses, which, while they may many times relate to and go "hand in hand" with the illegal activity contemplated in subsections (a) and (b), actually involve additions or supplements to the commission of racketeering offenses. These latter subsections—(c) or (d)—may be violated by a person who cannot be shown to have "obtained" a "pay off." On the other hand, if the person who violated (a) or (b) also found it necessary to participate in and use the specific means defined in (c) or (d), he committed more than one crime, and thus should properly be subject to cumulative sentences.

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[11] While they can be read to coincide, in part, subsection (a) seems to define recognized traditional types of racketeering; subsection (b), involves the taking of property by force or fear or in the guise of governmental authority.

In any event, whatever may be said as to subsections (a), (b) and (c), it seems evident that the mere fact that the conspiracy provision was inserted as subsection (d) does not alter the clear intent, revealed by specific addition of the conspiracy clause, to make conspiracy separately punishable.

2. *The 1946 Act.*

The Hobbs amendment, which became law in 1946, to a large extent was intended to eliminate the interpretation of the non-applicability of the 1934 Act to such employee relations as those involved in *United States v. Local 807*, 315 U.S. 521. See *United States* v. *Green*, 350 U.S. 415, 418-419. However, for our purposes, a further significant change was made in increasing the severity of punishment "from one to ten years" in the 1934 Act to "not more than twenty years" in the 1946 amendment (see *supra*, p. 3). This penalty increase evoked debate every year the bill was proposed, but attempts to reduce the punishment never succeeded [12] and the bill as finally passed provided for a 20-year penalty for violation of any section. This deliberate increase in severity cannot be reasonably interpreted as consistent with any theory of lenity.[13]

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[12] See, for example, H. Rep. No. 2176, 77th Cong., 2d Sess., pp. 1, 11; H. Rep. No. 66, 78th Cong., 1st Sess., p. 11; 89 Cong. Rec. 3194, 3201, 3205, 3229; 91 Cong. Rec. 11846, 11901-11902.

[13] In fact, Congressman Resa objected to the 1946 amendment as "undertak[ing] to multiply offenses punishable under Federal laws which are also punishable under the laws of the States * * *" 91 Cong. Rec. 11913.

Moreover, the structure of the Hobbs Act tends to meet the argument that the various provisions overlap. That Act read in pertinent part as follows:

> Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> Sec. 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

Thus, in 1946 the previous alternatives of (a) and (b) in the 1934 Act became Section 2 which contained all types and forms of "pay-offs" which are recognized as racketeering. Sections 3 and 5 continue the additional crimes formerly in subsections (d) and (c), respectively, of the 1934 Act. Section 4 defines a crime which is an incomplete stage of the offenses proscribed by Section 2 and stemmed from a division originally found in subsection (a). This Section may not have defined a crime which could have been punished in addition to a violation of Section 2, but only defined an offense which would merge with Section 2 on completion. There is no general attempt

statute in the federal Criminal Code so that attempts are punishable only if specifically so declared by Congress. Section 4 was therefore necessary to reach attempts which did not succeed, and we may assume *arguendo* that this is all that Congress intended to reach. But this does not aid petitioner for it is very clear, from the language of Section 5, that Congress intended that, when any scheme of extortion punishable under Section 2 was carried out through actual or threatened physical violence, such physical violence was to be subject to separate punishment. Otherwise, Section 5 would serve no purpose whatsoever. Thus, it cannot be said that the various parts of the Hobbs Act merely alternatively punished elements of the same offense. And considering the established view of conspiracy as a separate crime, as well as the special addition of the conspiracy provision in 1934, it seems evident that the conspiracy provision in Section 3 was, like Section 5, intended to define a separate crime.

3. *The 1948 codification.*

The present Act was enacted in 1948 as part of the revision of the Criminal Code and was condensed as part of the shortening process effected in the revision. The conspiracy provision was undoubtedly kept in the statute because of the penalty clause. The Reviser's Notes as to the general conspiracy statute, 18 U.S.C. 371, stated:

> A number of special conspiracy provisions, relating to specific offenses, which were contained in various sections incorporated in this title,

were omitted because adequately covered by this section. A few exceptions were made, (1) where the conspiracy would constitute the only offense, or (2) where the punishment provided in this section would not be commensurate with the gravity of the offense. * * *

The mere fact that the conspiracy was made punishable by the same statute as that which created the substantive offenses is not enough to impute to Congress an intent to overturn settled principles that conspiracy and the substantive offense are separate. A great number of conspiracy clauses, as in the Hobbs Act, 18 U.S.C. 1951, remain as part of separate statutes.[11] In the light of the established view as to conspiracy law, there was no reason for Congress to believe that any special wording would be

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[11] 15 U.S.C. 1-3, Sherman Anti-Trust Act; 15 U.S.C. 714m (d), offenses in connection with the Commodity Credit Corporation; 16 U.S.C. 831t(c), offenses in connection with the Tennessee Valley Authority; 18 U.S.C. 241, civil rights; 18 U.S.C. 286, defraud the government by claims; 18 U.S.C. 372, impede or injure an officer; 18 U.S.C. 757, escape of prisoner of war; 18 U.S.C. 793(g), 794(c), gather or deliver defense information to a foreign government; 18 U.S.C. 956(a), to injure property of a foreign government; 18 U.S.C. 1201(c), kidnapping; 18 U.S.C, 1792, riot in federal penal institution; 18 U.S.C. 2153(b), 2154(b), 2155(b), 2156(b), offenses in connection with sabotage; 18 U.S.C. 2192, to incite to revolt or mutiny; 18 U.S.C. 2271, to destroy vessels; 18 U.S.C. 2384, 2385, 2388(b), sedition, advocate overthrow of government, or activities affecting armed forces during war; 26 U.S.C. 7237, narcotic violations; 42 U.S.C. 2272, 2273, Atomic Energy Act of 1954; 50 U.S.C. 783, 822, 823(c), Internal Security Act; 50 U.S.C. App. 462, Universal Military Training and Service Act; 50 U.S.C. App. 1963, Displaced Persons Act.

necessary to render conspiracy a separate crime. Rather, special wording would have been necessary if Congress intended that conspiracy not be specially punishable. Certainly Congress could easily change the result by specifically forbidding punishment for both conspiracy and the substantive offenses, as has been done in Wisconsin. See Wisconsin Stat. Ann. § 939.72(2).[15] If such a change is to be made, it should be done directly by the legislature and not by court decision. *United States* v. *Isthmian Steamship Co.*, 359 U.S. 314. And a construction so contrary to established concepts should not be superimposed on the Anti-Racketeering Act under the guise of a rule of lenity.

C. *The rule of lenity does not prevent separate punishment of conspiracy in this case.*

In seeking to ascertain the intent of Congress, the petitioner argues, in effect, that where the legislation does not in terms provide for cumulative sentences, a policy of lenity should apply. The real question, however, is the intent of Congress in *this* Act. As Justice Holmes noted, "an argument that would prevail in one case may be inadequate in another." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 402. There is no basis for the rule of lenity here, for there is no indication of any attitude of lenity on the

---

[15] Wisconsin Stat. Ann. 939.72(2) provides:

"A person shall not be convicted under both:

* * * *

"(2) Section 939.31 for conspiracy and § 939.05 as a party to a crime which is the objective of the conspiracy; * * *."

part of Congress in this Act. The history of the Act shows a desire to make penalties more severe, rather than less. See *Gore* v. *United States*, 357 U.S. 386. Moreover, there is no special legislative history (showing one offense rather than two) such as influenced the interpretation of the Bank Robbery Act (*Prince* v. *United States*, 352 U.S. 322, and *Heflin* v. *United States*, 358 U.S. 415),[16] and the Fair Labor Standards Act (*United States* v. *Universal C.I.T. Credit Corporation*, 344 U.S. 218). As to the problem here, conspiracy and substantive offense, the statute does not come without "controlling gloss" as in *Bell* v. *United States*, 349 U.S. 81, 83. See also *Ladner* v. *United States*, 358 U.S. 169,[17] where the statute was interpreted as ambiguous in purpose and hence dependent upon separate impulses to sustain multiple sentences under one Act.

This statute comes, not only with such controlling gloss as the decisions of lower courts imposing separate sentences for conspiracy have given it, both before and after the Hobbs Act,[18] but, more im-

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[16] No claim was urged in *Heflin* that the conspiracy count there involved could not sustain a separate sentence.

[17] No contention was raised in *Ladner* concerning the concurrent sentence given under the conspiracy count.

[18] *Nick* v. *United States*, 122 F. 2d 660 (C.A. 8), certiorari denied, 314 U.S. 687; *Hulahan* v. *United States*, 214 F. 2d 441 (C.A. 8), certiorari denied, 348 U.S. 856; *Bianchi* v. *United States*, 219 F. 2d 182 (C.A. 8), certiorari denied, 349 U.S. 915; *Callanan* v. *United States*, 223 F. 2d 171 (C.A. 8), certiorari denied, 350 U.S. 862; *United States* v. *Dale*, 223 F. 2d 181 (C.A. 7); *Schm[illegible]* v. *United States*, 237 F. 2d 542 (C.A. 8); *United States* v. *Palmiotti*, 254 F. 2d 491 (C.A. 2).

portantly, with the controlling gloss of a whole century of judicial decisions which, in every type of situation in which the question has arisen, have treated the crime of conspiracy and a substantive offense committed pursuant to that conspiracy as separate and distinct. Whatever may be said of presumed congressional intent to treat as alternates closely related substantive offenses created by one statute, no such argument can be made with respect to conspiracy and substantive offenses. As to those crimes, the separateness of the offenses has too long and too well established a history to be ignored. To repeal so long established and firmly settled a doctrine some specific indication of congressional intent would be necessary. Here not only is there no such indication, but, on the contrary, as we have shown, the materials that are available indicate that Congress intended conspiracy to be separately punishable. And, finally, as pointed out above, the underlying reason for the numerous judicial decisions treating conspiracy as separate from the substantive offense is the concept that combination for criminal purposes can be more dangerous than the consummated act performed individually.

This reasoning applies with peculiar force to the anti-racketeering laws. In the present case, for example, the defendants, persons controlling groups, by combining together could bring to bear on the victim practically all the labor force on the job. Such force makes possible extortion to an extent that no single individual working alone can possibly effectuate. Conspiracy under this Act represents a more potent

threat and one different in kind and nature from mere extortion. There is therefore especially good reason to apply here the settled principle that combination is itself a crime separate from the crime that may result therefrom.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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No. 47.

IN THE

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OCTOBER TERM, 1960.

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v.

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

ARGUMENT.

The Government argues that the available materials indicate that Congress intended conspiracy to be separately punishable, that the separateness of conspiracy and substantive offenses "has too long and too well established a history to be ignored" and that the concept "that combination for criminal purposes can be more dangerous than the consummated acts performed individually" applies with peculiar force to the anti-racketeering laws.

But the available materials do not indicate that Congress intended cumulative punishment. While Congress did not choose to make the substantive offense require, by definition, more than one participant, yet its chief concern was to punish wrong-doings which usually involved more than one participant. From its beginnings in the legislative hearings in 1933, the Anti-Racketeering Act was directed against combinations for criminal purposes and was not enacted against the efforts of a lone wrongdoer. The legislation was not designed to punish extortion or robbery as such but was intended to punish activities which interfere with interstate commerce. The restraint of commerce is the unit of prosecution and when this is single the punishment should likewise be single.

The Government itself recognizes that the Act was designed to provide a substitute for the attempt to prosecute racketeering under the Sherman Act. The only reason that combination was eliminated as an element of the substantive offense was to ease the burden of proof. The memorandum of the Special Assistant to the Attorney General recognized that "it is often difficult to prove that the acts of racketeers affecting interstate commerce amount to a conspiracy in restraint of such commerce" and that such restraints were to be punishable "whether the restraints are in the form of conspiracies or not" (See petitioner's brief pp. 17-19). The prime purpose for redrafting the bill after it passed the Senate in 1934 was the fear of its application to labor combinations. Therefore the Attorney General's second draft contained a proviso preserving the rights of labor organizations. This draft, retained both the indefinite imprisonment and fine provisions of the original version, again indicating no cumulative punishment was intended or needed.

We agree with the Government that subsections (c) and (d) of Section 2 of the 1934 Act were designed to cover a person who could not be shown to have obtained a "pay

off". The Government concedes that subsections (a) and (b) of Section 2 were intended as alternate offenses. It contends that subsections (c) and (d) were not so intended and that if a person who violated (a) or (b) also found it necessary to use the specific means defined in (c) or (d), he was properly subject to cumulative sentences.

The specific means mentioned in subsection (c) was violence or a threat of violence in furtherance of a plan or purpose to violate (a) or (b). But (a) and (b) both forbade violence. Indeed the Attorney General's letter accompanying the second draft itself states that "the typical activities affecting interstate commerce are those in connection with price-fixing and economic extortion directed by professional gangsters" and such activities were made unlawful "when accompanied by violence"[1] (See petitioner's brief pp. 20-21).

The Attorney General's second draft also added subsection (d) prohibiting both concerted acts and conspiracy. The Government argues that this clause was designed to increase the punishment provided by the general conspiracy statute. But subsection (d) punished concerted action such as aiding, abetting or counseling even in the absence of a conspiracy or a "payoff". The United States ignores the issue as to whether subsection (d) punished the same type of conspiracy as the general conspiracy statute which requires the commission of an overt act, that a conspirator do an act "to effect the object of the conspiracy." Subsection (d) on its face did not require an overt act to complete the offense but proscribed against a common law conspiracy.[2]

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[1] A further indication that the specific means defined in (c) or (d) were not intended for cumulative sentence is that the specific language used in (c) was employed in haec verba in subsection (a) of the second draft which was stricken on the floor of the House. See Appendix pp. 3-5.

[2] See *Nash v. United States*, 229 U. S. 373, 376-378; *Singer v. United States*, 323 U. S. 338, 340.

The initial draft of the 1934 Act showed an intention to ease the proof by making combinations unnecessary. Subsections (c) and (d) were further manifestations of a desire to ease the proof by making inchoate crimes punishable. This was done without any intent to increase punishment. As we have already pointed out, the maximum punishment provision of the second draft, as in the initial version, was an indefinite fine and 99 years imprisonment. These drafts show that Congress intended to reach all violators, leaving to the discretion of the Court the fixing of penalties in relation to the severity of the crime.

The memorandum of Walter Rice, the Special Assistant to the Attorney General, and the subsequent letter of Attorney General Homer Cummings together leave the conclusion that the initial intent was not to punish a conspiracy as such and that the subsequent intent was to include a common law conspiracy, if the crime was inchoate. The statement of the Attorney General that "We have added a new provision prohibiting conspiracy as well as the substantive acts" does not indicate that prior to that time a conspiracy to violate the act was punishable. Indeed a common-law conspiracy was not punishable. Certainly, the memorandum and the letter when read together do not indicate an intent to increase the punishment from the two year limit which the general conspiracy statute at that time provided for an overt act crime.

Nothing in the 1946 Act or its history warrants the inference that aggregate punishment was desired. Again the main concern of Congress was with combinations, the exemption of labor organizations. The sponsor, Mr. Hobbs, assured Congress that 20 years was the maximum penalty, a penalty which he arrived at by looking at state law, primarily the law of New York, where a combination for unlawful purposes was considered in itself to be a minor crime.

The 1946 version defines in Sections 3, 4 and 5 crimes which are an incomplete stage of the offenses proscribed by Section 2. While the Government concedes that Section 4, the attempt provision, does not provide for additional punishment. It would have the other sections so provide. Of course that section prohibited not only an attempt but also punished anyone who "participates in an attempt to do anything in violation of Section 2." Apparently this also was designed to cover concerted action. Otherwise it would have been limited to whoever attempts to violate the section.

The fact that Congress in 1946 chose to double the punishment for a violation does not afford support for a conclusion that cumulative punishment was now intended. This increase in penalty does not create an inference that Congress at the same time intended not only a 20 year maximum but cumulative punishment with a maximum of 40, 60 or 80 years if the means of interfering with interstate commerce violated more than one subsection. In **Gore v. United States**, 357 U. S. 386, this Court reexamined the decision of **Blockburger v. United States**, 284 U. S. 299. It concluded that the Court in the **Blockburger** case was not unaware of the legislative materials in holding that narcotics violations may be cumulatively punishment, finding support in the fact that there were "three different enactments, each relating to a separate way of closing on illicit distribution of narcotics, passed at different periods, for each of which a separate punishment was declared by Congress." Here we have one enactment dealing with a single way of punishing racketeering. While the Act was changed twice, one amendment was designed to close a gap by eliminating an exception for certain labor union activity and the other amendment was part of a general revision of the entire criminal code.

Indeed the 1948 codification of the criminal laws itself indicates that the instant conspiracy section was not de-

signed to increase the punishment prescribed by the general conspiracy statute if a conspiracy was directed at a violation of the Anti-Racketeering statute. The Hobbs Act was excluded from the Reviser's specific mention of the particular sections of the Criminal Code, Title 18, retained to provide special punishment provisions commensurate with the gravity of the crime. Again, this shows the uniqueness of this statute and the inapplicability of doctrinaire considerations.

The Government does not argue that the entire statute was not directed primarily against criminal combinations. Rather it contends that the "controlling gloss" of this case are judicial decisions relative to the crime of conspiracy under the general conspiracy statute and the substantive offense committed thereunder, and it argues that the doctrine of such cases cannot be ignored. The issue is not the separateness of a conspiracy under the general conspiracy statute and its substantive offense but whether Congress under the Anti-Racketeering Act intended aggregate punishment for the conspiracy and its resulting completed crime. Since we are not concerned with the general conspiracy statute and its resulting substantive crime, its history sheds little light in expounding this particular legislation. And as we have pointed out, an overt act conspiracy is different from a common law conspiracy. This Court should not assume in the absence of legislative evidence that Congress meant to impose a 20 year penalty for a conspiracy which did not manifest itself by an overt act and intended an additional penalty of 20 years for its consummation. Moreover, the Government ignores the prime purpose of the statute in 1934 and again in 1946 was to penalize group and concerted effort interfering with commerce. The Government chooses to overlook that the sponsor of the 1946 Act, Representative Hobbs, specifically stated that the 20 year penalty was a maximum, and that the Court should decide the penalty within such limits

according to the gravity of the crime. The controlling gloss is not the judicial doctrine but the dominant motive to protect interstate commerce from interference by organized combinations "whether the restraints are in form of conspiracies or not."

At best the Government's approach is speculative. If the available materials do not support petitioner, the principles of lenity as expressed in **Ladner v. United States**, 358 U. S. 169, 178, are applicable:

> "* * * This policy of lenity means that the court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended. * * *"

CONCLUSION.

For the reasons set out above and for those set out in petitioner's original brief, the judgment below should be reversed.

Respectfully submitted,

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FILE COPY.

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PETITION FOR REHEARING.

Petitioner prays that this Court grant him a rehearing of its decision of January 9, 1961, affirming the judgment of the Court of Appeals for the following reasons.

REASONS FOR GRANTING A REHEARING.

The Court finds that the legislative history sheds no light on the maximum penalty. It concludes that "the distinctiveness between a substantive offense and a con-

spiracy to commit it is a postulate of our law", that there is an important public policy for punishing a conspiracy separately, and that such considerations are the presuppositions of separately defined crimes in the Hobbs Act indicating a "tacit purpose" of Congress to maintain a long-established distinction between such offenses.

Thus, under this decision, Congressional silence creates a presumption that a legislative intent to punish cumulatively a conspiracy and its resulting substantive crime is assumed in the absence of specific language to the contrary. But the treatment of conspiracy in the 1934 legislative program, of which this act was a part, should overcome this presumption.

The 1934 Anti-Racketeering Act was one of a series of eleven bills in a legislative program of the 73d Congress which were designed to close gaps in existing federal criminal laws.[1] Eight of the bills established or amended penal statutes. Six of these statutes were approved on May 18, 1934 and the others were approved near that date.

Three separate procedures were followed in this program to define conspiracy crimes. The method used in four of the enactments of the program was complete silence as to conspiracy. Significantly, these statutes provided for either the same or a higher maximum penalty for a substantive violation as the Anti-Racketeering Act. One of these bills (S. 2249) even proscribed against extortion and established a maximum penalty of 20 years for threats transmitted in interstate commerce.[2] 48 Stat. 781. The other three acts were the bank robbery statute (S.

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[1] S. Rep. No. 1440, 73d Cong., 2d Sess.; *United States v. Local 807*, 315 U. S. 521, 530.

[2] This bill, originally enacted in 1932 as a companion bill to the Lindbergh Act, had previously been limited to the mailing of threatening communications.

2841) considered in **Prince v. United States**, 352 U. S. 322, 48 Stat. 783, the assault act (S. 2080) involved in **Ladner v. United States**, 358 U. S. 169, 48 Stat. 780, and the act extending the National Motor Vehicle Theft Act (S. 2845) to other stolen property. 48 Stat. 794. The former statute provided for maximum substantive penalties of 20 or 25 years[3] and the latter two statutes authorized 10 year maximum penalties for substantive violations. These statutes reflected a tacit purpose to punish conspiracy by the two year penalty provided by the general conspiracy statute. Congress also expressly intended that the statutes which provided for ten year maximum substantive penalties were of equal magnitude with the ten year penalty in the Anti-Racketeering Act and that the other statutes, with their greater penalties, defined more serious crimes.

The second procedure followed was the combining of conspiracy and the substantive offense in one provision without specific language as to conspiracy punishment. This form was adopted in the Anti-Racketeering Act and in an act defining crimes committed in the administration of penal institutions (S. 2575). 48 Stat. 782. In both instances, a maximum ten year penalty was authorized. The Court here finds that such enactments, in the absence of specific language, indicate a silent purpose to punish cumulatively the conspiracy and its resulting crime.

The third means employed in the kidnapping act (S. 2252), expressly provided for conspiracy punishment. It specifically stated that if two or more persons enter into a conspiracy to violate the provisions of the substantive kidnapping act and do any overt act toward carrying out such conspiracy "such person or persons shall be punished

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[3] An aggravated form of bank robbery was also made a capital crime.

in like manner as hereinbefore provided by this act". 48 Stat. 781, 782. This statute, an amendment of an earlier statute in other particulars, showed an intent to increase the punishment for a conspiracy to violate the kidnapping act. Since the punishment provided by the Lindbergh Act was either life, death or a term of years in the discretion of the Court, there was no mute purpose to punish cumulatively.

The Court's decision leads to the anomalous conclusion that Congress impliedly intended substantially the same penalty for a substantive and conspiratorial violation of the Anti-Racketeering Act as for other acts for which it expressly provided a greater penalty for substantive violations and that it tacitly intended a greater penalty for violations of the Racketeering Act than for those acts to which it created the same substantive penalty. There is nothing to indicate that Congress considered a substantive and conspiratorial violation of the Anti-Racketeering Act more reprehensible than dual violations of substantive crimes which it had equated as of similar magnitude. There is further no basis for assuming a tacit purpose to consider such violations of the instant act as reprehensible as similar dual violations of the other graver substantive offenses proscribed by this legislative program. Such presuppositions should not rest on mere silence. "It is at best treacherous to find in Congressional silence, alone, the adoption of a controlling rule of law." **Girouard v. United States**, 328 U. S. 61, 69.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that rehearing be granted.

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Certificate of Counsel.

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1960.

Lawrence Callanan, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[January 9, 1961.]

Mr. Justice Frankfurter delivered the opinion of the Court.

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Missouri on two counts. Count I charged a conspiracy to obstruct commerce by extorting money, and Count II charged the substantive offense of obstructing commerce by extortion, both crimes made punishable by the Hobbs Anti-Racketeering Act, 18 U. S. C. § 1951.[1] Petitioner was sen-

[1] Section 1951 (a) is as follows:

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

The pertinent parts of the Hobbs Act Amendments of 1946, 60 Stat. 420, from which the 1948 codification was compiled, were as follows:

"Sec. 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or commodity in commerce, by robbery or extortion, shall be guilty of a felony.

"Sec. 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.

"Sec. 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.

"Sec. 5. Whoever commits or threatens physical violence to any

tenced to consecutive terms of twelve years on each count, but the sentence on Count II was suspended and replaced with a five-year probation to commence at the expiration of his sentence under Count I.[2] On appeal, the conviction was affirmed, 223 F. 2d 171.

Petitioner thereafter sought a correction of his sentence, invoking Rule 35 of the Federal Rules of Criminal Procedure as well as 28 U. S. C. § 2255.[3] He claimed that the maximum penalty for obstructing interstate commerce under the Act by any means is twenty years and that Congress did not intend to subject individuals to two penalties. The District Court denied relief, holding that the Hobbs Act gave no indication of a departure from the usual rule that a conspiracy and the substantive crime which was its object may be cumulatively punished. 173 F. Supp. 98. The Court of Appeals for the Eighth Circuit affirmed this judgment, 274 F. 2d 601. Deeming the question raised by petitioner of sufficient importance, we brought the case here. 362 U. S. 939.

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person or property in furtherance of a plan or purpose to do anything in violation of section 2 shall be guilty of a felony.

"SEC. 6. Whoever violates any section of this title shall, upon conviction thereof, be punished by imprisonment for not more than twenty years or by a fine of not more than $10,000, or both."

The Reviser's Note to the 1948 Code states that "The words 'attempts or conspires so to do' were substituted for sections 3 and 4 of the 1946 act, . . ."

[2] Petitioner was released from imprisonment in April 1960 and currently is on parole. Both parties and the courts below apparently have interpreted the probationary period for Count II to commence at the expiration of petitioner's parole for Count I.

[3] Both courts below ruled that 28 U. S. C. § 2255 was not available since it would be premature to claim the "right to be released" from a sentence not yet served. Since, as the Government concedes, Rule 35 is available to correct an illegal sentence when the claim is based on the face of the indictment even if such claim had not been raised on direct appeal, *Heflin* v. *United States*, 358 U. S. 415, 418, 422, the applicability of § 2255 need not be considered.

Under the early common law, a conspiracy—which constituted a misdemeanor—was said to merge with the completed felony which was its object. See *Commonwealth* v. *Kingsbury*, 5 Mass. 106. This rule, however, was based upon significant procedural distinctions between misdemeanors and felonies. The defendant in a misdemeanor trial was entitled to counsel and a copy of the indictment; these advantages were unavailable on trial for a felony. *King* v. *Westbeer*, 1 Leach 12, 15 (1739); see Clark and Marshall, Crimes, § 2.03, n. 96 (6th ed.). Therefore no conviction was permitted of a constituent misdemeanor upon an indictment for the felony. When the substantive crime was also a misdemeanor, *People* v. *Mather*, 4 Wen. 229, 265 (N. Y.), or when the conspiracy was defined by statute as a felony, *State* v. *Mayberry*, 48 Me. 218, 238, merger did not obtain. As these common-law procedural niceties disappeared, the merger concept lost significance, and today it has been abandoned. *Queen* v. *Button*, 11 Q. B. 929, 116 Eng. Rep. 720; *Pinkerton* v. *United States*, 328 U. S. 640.

Petitioner does not draw on this archaic law of merger. He argues that Congress by combining the conspiracy and the substantive offense in one provision, § 1951, manifested an intent not to punish commission of two offenses cumulatively. Unlike the merger doctrine, petitioner's position does not question that the Government could charge a conspiracy even when the substantive crime that was its object had been completed. His concern is with the punitive consequences of the choice thus open to the Government; it can indict for both or either offense, but, petitioner contends, it can punish only for one.

The present Hobbs Act had as its antecedent the Anti-Racketeering Act of 1934.[4] In view of this Court's restric-

[4] The original bill, S. 2248, 73d Cong., 2d Sess., did not contain any provision concerning conspiracy. (Of course, the general conspiracy statute, R. S. § 5440, now 18 U. S. C. § 371, which then provided for

tive decision in *United States* v. *Local 807*, 315 U. S. 521 (1942), Congress, under the leadership of Representative Hobbs, sought to stiffen the 1934 legislation. After several unsuccessful attempts over a period of four years, a bill was passed in 1946 which deleted any reference to wages paid by an employer to an employee, on which the decision in *Local 807* had relied.[5] The 1934 Act was fur-

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a maximum two-year sentence, was available.) The bill made punishable by imprisonment from one to ninety-nine years acts of violence, extortion, and coercion which interfered with interstate commerce. 78 Cong. Rec. 11403. The purpose of the legislation was to provide for direct prosecution of large-scale racketeering, which formerly had been ineffectively attempted through the Sherman Act, which had a maximum penalty of one year imprisonment or $5,000 fine. S. Rep. No. 532, 73d Cong., 2d Sess. p. 1. After the bill had passed the Senate, 78 Cong. Rec. 5735, some question was raised as to whether legitimate labor activity was not threatened by the statutory phraseology, 78 Cong. Rec. 5859, 10867, and provisos were suggested by the House Judiciary Committee in reporting the measure to the full body. H. R. Rep. No. 1833, 73d Cong., 2d Sess. The Committee, upon the suggestion of the Attorney General, further added a section making conspiracy to commit any of the designated substantive violations punishable. *Ibid.* The amended bill was passed by the House substantially as reported except that the penalty was decreased to ten years or $10,000. 78 Cong. Rec. 11403. The House bill was summarily approved by the Senate. 78 Cong. Rec. 11482.

[5] A little over two months after the decision, H. R. 7067 was introduced by Representative Hobbs in the House of Representatives, 88 Cong. Rec. 4080, following Hearings before a Subcommittee of the Committee on the Judiciary, 77th Cong., 2d Sess. The bill was reported favorably out of committee, the only major change being the reduction of the proposed twenty-year maximum sentence to ten years. In discussing the various provisions, the report stated: "The objective of Title I is to prevent anyone from obstructing, delaying, or affecting commerce, or the movement of any article or commodity in commerce by robbery or extortion as defined in the bill. A conspiracy or attempt to do anything in violation of section 2 is likewise made punishable . . . ." H. R. Rep. No. 2176, 77th Cong., 2d Sess., p. 9. No further congressional action was taken on the bill.

The following year, Representative Hobbs introduced H. R. 653

ther invigorated by increasing the maximum penalty from ten to twenty years.

Petitioner relies on numerous statements by members of Congress concerning the severity of the twenty-year penalty to illustrate that cumulative sentences were not contemplated.[6] But the legislative history sheds no light

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which was identical with his prior bill. This time the Committee did not amend the twenty-year penalty. H. R. Rep. No. 66, 78th Cong., 1st Sess. The measure passed the House, 89 Cong. Rec. 3230, but no action was taken in the Senate.

In 1945 Representative Hobbs again introduced his amendment. H. R. 32, 79th Cong., 1st Sess. The measure was passed by both bodies, 91 Cong. Rec. 11922, 92 Cong. Rec. 7308. Both Committee reports again stated that "A conspiracy or attempt to do anything in violation of section 2 is likewise made punishable." S. Rep. No. 1516, 79th Cong., 2d Sess.; H. R. Rep. No. 238, 79th Cong., 1st Sess., p. 9.

The pertinent parts of the amendment, 60 Stat. 420, are set out in n. 1, *supra*.

[6] Typical excerpts on which petitioner relies are:

"Mr. DELANEY. The fact of the matter is that this committee report was not unanimous. Also, in the committee it was indicated by those in favor of this legislation that the legislation is too drastic, that the $10,000 fine and 20 years in jail is too drastic. They think a modified bill might be more in consonance with present-day thinking." (89 Cong. Rec. 3162.)

"Mr. FISH. I want to refer likewise to some of the excessive penalties. The penalties in this bill in my opinion are too severe—20 years and $10,000 fine. When we reach this section of the bill there should be very careful consideration given to reducing both the extent of the imprisonment and fines." (89 Cong. Rec. 3194.)

"Mr. SPRINGER. May I ask my distinguished colleague on the Committee on the Judiciary if it is not a fact that under the provisions of this bill the question of penalty is left entirely discretionary with the court trying the case? Under the provisions of this bill a person could be penalized to the extent of 1 year or less than 1 year or up to 20 years, all in the discretion of the court.

"Mr. CELLER. Or his sentence might be suspended. I agree with

whatever on whether the Congressmen were discussing the question of potential sentences under the whole bill or merely defending the maximum punishment under its specific sections. All the legislative talk only reiterates what the statute itself says—that the maximum penalty is twenty years.

The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law. "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States*, 328 U. S. 640, 643. See also *Pereira* v. *United States*, 347 U. S. 1, 11. Over the years, this distinction has been applied in various situations. For example, in *Clune* v. *United States*, 159 U. S. 590, the Court upheld a two-year sentence for conspiracy over the objection that the crime which was the object of the unlawful agreement could only be punished by a $100 fine. The same result was reached when, as in the present case, both offenses were described within the same statute. In *Carter* v. *McClaughry*, 183 U. S. 365, cumulative sentences for conspiracy to defraud and fraud were upheld.

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the gentleman. But why do we single out labor and impose even a possible penalty of 20 years?" (89 Cong. Rec. 3201.)

"Mr. Robsion. There is some objection to the penalties prescribed in this bill for robbery and extortion. It has gone forth to the country that the penalty is 20 years. That is not a correct statement. The penalties range from 1 hour up to 20 years, according to the offense, and fines of $1 to $10,000. In other words, the 20 years and the $10,000 fine are the maximum." (89 Cong. Rec. 3226.)

"Mr. Fish. When the bill was before the Rules Committee it seemed to me at that time that these penalties were excessive. Twenty years is just about as bad as a life sentence, and I want to give the House the opportunity to reduce it by cutting it in half. This applies to threats. A man may be sent to jail for 20 years merely for threatening extortion." (89 Cong. Rec. 3229.)

"Cumulative sentences," the Court pronounced, "are not cumulative punishments, and a single sentence for several offences, in excess of that prescribed for one offence, may be authorized by statute." 183 U. S., at 394.

This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.[7]

These considerations are the presuppositions of the separately defined crimes in § 1951. The punitive consequences that presumably flow from them must be placed in such context. Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law. This legislation was the formulation of the two Judiciary Committees, all of whom are lawyers, and the Congress is predominately a lawyers' body. We attribute "to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different; a dis-

[7] For a discussion of these problems of the law of conspiracy see Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 922-925, 968-971.

tinction whose practical importance in the criminal law is not easily overestimated." *United States* v. *Rabinowich*, 238 U. S. 78, 88.

These considerations are reinforced by a prior interpretation of the Sherman Act whose minor penalties influenced the enactment of the 1934 anti-racketeering legislation.[8] In *American Tobacco* v. *United States*, 328 U. S. 781, individual and corporate defendants were convicted, *inter alia*, of conspiracy to monopolize and monopolization, both made criminal by § 2. They were sentenced to a fine of $5,000, the maximum statutory penalty, on each of the counts. We affirmed these convictions on the basis of our past decisions in this field of law. 328 U. S., at 788–789. To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive conduct, and effectuate a reversal of the settled interpretation we pronounced in *American*

[8] The Senate Report which accompanied the original 1934 legislation described the purpose of the Act by setting forth a memorandum received from the Justice Department:

". . . The nearest approach to prosecution of racketeers as such has been under the Sherman Antitrust Act. This act, however, was designed primarily to prevent and punish capitalistic combinations and monopolies, and because of the many limitations engrafted upon the act by interpretations of the courts, the act is not well suited for prosecution of persons who commit acts of violence, intimidation, and extortion . . . . Moreover, a violation of the Sherman Act is merely a misdemeanor, punishable by 1 year in jail plus $5,000 fine, which is not a sufficient penalty for the usual acts of violence and intimidation affecting interstate commerce." S. Rep. No. 532, 73d Cong., 2d Sess., p. 1.

Representative Celler, in arguing for a less severe penalty during the 1945 debates, said:

"If you look at the antitrust penalties against employers you find that they are only $5,000 or 1 year in jail. This bill has direct relation to the antitrust laws, the Clayton Act." 91 Cong. Rec. 11902.

See also Representative Celler's remarks during the 1943 debates, 89 Cong. Rec. 3201.

Tobacco would require specific language to the contrary. See also *Albrecht* v. *United States*, 273 U. S. 1, 11; *Burton* v. *United States*, 202 U. S. 344, 377.

Petitioner argues that some of the other provisions of § 1951 seem to overlap and would not justify cumulative punishment for separate crimes. From this he deduces a congressional intent that the statute allows punishment for only one crime no matter how many separately outlawed offenses have been committed. These contentions raise problems of statutory interpretation not now here. That some of the substantive sections may be repetitive as being variants in phrasing of the same delict, or that petitioner could not be cumulatively punished for both an attempt to extort and a completed act of extortion; has no relevance to the legal consequences of two incontestably distinctive offenses, conspiracy and the completed crime that is its object. In the *American Tobacco* litigation it was decided that the attempt to monopolize, described in § 2 of the Sherman Act, merged with the completed monopolization, but this result did not qualify the holding that cumulative sentences for the conspiracy and the substantive crime, also contained within § 2, were demanded by the governing precepts of our law.

Petitioner invokes "the rule of lenity" for decision in this case. But that "rule," as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one.[1] "To rest upon a formula is a slumber that, prolonged, means death." Mr. Justice Holmes in Collected Legal Papers, p. 306. The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being

[1] "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell* v. *United States*, 349 U. S. 81, 83.

lenient to wrongdoers. That is not the function of the judiciary. In *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Bell* v. *United States*, *supra*, and *Ladner* v. *United States*, 358 U. S. 169, the applicable statutory provisions were found to be unclear as to the appropriate unit of prosecution; accordingly, the rule of lenity was utilized, *in favorem libertatis*, to resolve the ambiguity. In *Prince* v. *United States*, 352 U. S. 322, and *Heflin* v. *United States*, 358 U. S. 415, the Court had to meet the problem whether various subsidiary provisions of the Federal Bank Robbery Act, 18 U. S. C. § 2113, which punished entering with intent to commit robbery and possessing stolen property, merged when applied to a defendant who was also being prosecuted for the robbery itself. Again the rule of lenity served to resolve the doubt with which Congress faced the Court.

Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us involves neither the appropriate unit of prosecution—whether conduct constitutes one or several violations of a single statutory provision—nor is it an open question whether conspiracy and its substantive aim merge into a single offense. This is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components. If petitioner had committed two separate acts of extortion, no one would question that the crimes could be punished by consecutive sentences; the result seems no less clear in the present case. It was therefore within the discretion of the trial judge to fix separate sentences, even though Congress has seen fit to authorize for each of these two offenses what may seem to some to be harsh punishment.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1960.

Lawrence Callanan, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[January 9, 1961.]

Mr. Justice Stewart, whom The Chief Justice, Mr. Justice Black, and Mr. Justice Douglas join, dissenting.

To be sure it is now a commonplace of our law that the commission of a substantive crime and a conspiracy to commit it may be treated by Congress as separate offenses, cumulatively punishable. *Pinkerton* v. *United States*, 328 U. S. 640, 643. It is also true that Congress has often chosen to exercise its power to make separate offenses of the two.[1] But neither of these generalities provides an answer to the question now before us. The question here is the meaning of *this* law, the Hobbs Anti-Racketeering Act. I do not agree that under this statute a man can be separately convicted and cumulatively punished for obstructing commerce by extorting money, and for conspiring to obstruct commerce by the same extortion. My view is based both upon the language of the statute and upon its history, considered in the light of principles that have consistently guided this Court's decisions in related areas of federal criminal law.

The relevant section of the Act, repeated for convenience in the margin,[2] is not a model of precise verbal

[1] The most notable illustration of this is the General Conspiracy Statute, 18 U. S. C. § 371.

[2] "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,

structure. Purely as a matter of syntax, the section could be read as creating separate offenses for obstructing commerce, for delaying commerce, and for affecting commerce by any one of the proscribed means. It could be read, again merely as a matter of grammar, as creating distinct offenses for obstructing commerce by robbery, for threatening physical violence to property in connection with the same robbery, for committing the physical violence which had been threatened, for attempting to do so, and for conspiring to do so. Read in such a way the Act could be made to justify the imposition upon one man of separate sentences totalling more than a hundred years for one basic criminal transaction. To construe this statute that way would obviously be absurd, and I do not understand that the Court today even remotely suggests any such construction.

The Act, then, must mean something else. I think its language can fairly be read as imposing a maximum twenty-year sentence for each actual or threatened interference with interstate commerce accomplished by any one or more of the proscribed means. Such a reading of the Act does violence neither to semantics nor to common sense. It is fully justified by the legislative history, and it is consistent with settled principles governing the construction of ambiguous criminal statutes. If this is what the Act means, then the indictment in the present case charged but a single offense, and it was wrong to impose two separate sentences upon the petitioner.

The antecedent of the present Act was the Anti-Racketeering Act of 1934. That legislation was originally introduced after extensive hearings before a subcommittee

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by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both." 18 U. S. C. § 1951 (a).

of the Senate Committee on Commerce, popularly known as the Committee on Racketeering. The original bill did not contain any reference to conspiracy. S. 2248, 73d Cong., 2d Sess. The Committee Report consisted of a memorandum from the Department of Justice, stating that the purpose of the bill was to permit prosecution of so-called "racketeers" for acts constituting racketeering. Significantly, the memorandum stated "The accompanying proposed statute is designed to avoid many of the embarrassing limitations in the wording and interpretation of the Sherman Act, and to extend Federal jurisdiction over all restraints of any commerce within the scope of the Federal Government's constitutional powers. Such restraints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, *whether the restraints are in form of conspiracies or not.*" (Emphasis added.) S. Rep. No. 532, 73d Cong., 2d Sess., p. 1.

After the bill had passed the Senate fear was expressed that some of the provisions of the proposed legislation might endanger legitimate activities of organized labor. In response to these fears the bill was revised by the House Judiciary Committee along lines suggested by the Attorney General, and it was then that the statutory reference to conspiracy was added, without explanation. H. R. Rep. No. 1833, 73d Cong., 2d Sess. The bill was passed by the House after adoption of an amendment reducing the maximum punishment provision to "10 years or by a fine of $10,000 or both." 78 Cong. Rec. 11403. Thereafter, the Senate approved the House bill without debate. 78 Cong. Rec. 11482.

In 1942 this Court considered the 1934 Act in *United States* v. *Local 807*, 315 U. S. 521, holding that under the statute's labor exemption the petitioners there had been wrongly convicted. Within a few weeks after that decision, Representative Hobbs introduced a bill in the House designed to eliminate the labor exemption from the

statute. Similar amendatory bills were introduced in succeeding sessions of Congress, and in 1946 the Act was finally amended by deletion of the provision exempting wages paid by an employer to an employee, the exemption upon which the decision in the *Local 807* case had been based.

With that aspect of the 1946 amendment we are not here concerned. But the amendment made one other significant change in the Act: it increased the maximum penalty from ten to twenty years imprisonment. The congressional debates over that provision throw considerable light upon the problem now before us. For two conclusions can be drawn from a review of the discussions in Congress of the proposed increase in the penalty provision. First, it is clear that many Members of Congress were seriously concerned by the severity of a penalty of twenty years in prison for violation of this statute. Expressions such as "too drastic," "too severe," and "excessive" were used in describing what was referred to by one Member as "even a possible penalty of 20 years." 89 Cong. Rec. 3162, 3194, 3201, 3229. Secondly, it is clear that there was general agreement among both the proponents and the opponents of the legislation that twenty years was to be the maximum penalty that could be imposed upon a defendant convicted of violating the statute. 89 Cong. Rec. 3226. No one ever suggested that cumulative penalties could be inflicted.

In sum, then, we have here a statute which, as a matter of English language, can fairly be read as imposing a single penalty for each interference or threatened interference with interstate commerce by any or all of the prohibited means. We have evidence stemming from the very origin of the legislation that the unit of prosecution under the statute was to be each restraint of commerce, not each means by which the restraint was accomplished. As the original Senate Committee Report stated, "re-

straints if accompanied by extortion, violence, coercion, or intimidation, are made felonies, whether the restraints are in form of conspiracies or not." Finally, we have every indication that when the Act was amended in 1946 Congress was agreed that but a single maximum sentence of twenty years could be imposed upon conviction, and that many members of Congress considered even that penalty far too severe.

It is said, however, that despite all this we must attribute to Congress a "tacit purpose" to provide cumulative punishments for conspiracy and substantive conduct under this statute. We are told that this presumption of a tacit purpose must prevail because there is no "specific language to the contrary" in the Act.[3] But to indulge in such a presumption seems to me wholly at odds with principles firmly established by our previous decisions.

In *Bell* v. *United States*, 349 U. S. 81, we described the approach to be taken in a case such as this. "When Congress has the will it has no difficulty in expressing it. . . . When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." 349 U. S., at 83. In *Ladner* v. *United States*, 358 U. S. 169, we said: "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what

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[3] The Court's reliance upon *American Tobacco* v. *United States*, 328 U. S. 781, seems to me misplaced. The discussion of multiple punishment in that opinion was in response to the contention that Congress could not, because of the double jeopardy provision of the Fifth Amendment, impose multiple punishment for substantive conduct and conspiracy. Moreover, to decide the meaning of this Act upon the basis of what Congress may have provided in another statute, would seem to me a dubious way to resolve the issue. Cf. *Bell* v. *United States*, 349 U. S. 81, 83.

Congress intended." 358 U. S., at 178. In *Prince* v. *United States*, 352 U. S. 322, we spoke of the doctrine as one "of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history." 352 U. S., at 329. These recent expressions are but restatements in a specific context of the ancient rule that a criminal statute is to be strictly construed. I would not depart from that rule in the present case.